NAVAL WAR COLLEGE

INTERNATIONAL LAW SITUATIONS

WITH

SOLUTIONS AND NOTES

1901

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PREFACE.

The studies in international law at the Naval War College during the summer of 1901 were under the immediate direction of Mr. John Bassett Moore, late Assistant Secretary of State, now of Columbia University. The mention to the service of his name gives assurance of the value of the present work. To his able and careful labors in the present instance the college is deeply indebted.

The situations were set by Mr. Moore, and tentative solutions were sent in by the several committees into which the officers in attendance are divided for the college work. The tentative solutions were then discussed orally, the discussions being presided over and directed by Mr. Moore, who prepared and read the accompanying notes, and who is also the author of the paper in the appendix, entitled "Maritime Law in the War with Spain." The printed solutions exhibit the consensus of opinion of all concerned.

It is believed that by proposing cases simulating those which have recently arisen, or which seem likely to arise under modern conditions, and bringing to bear in mutual discussion the thought and experience of the officers who make application of the law, and the trained mind of the international jurist who expounds it, a method has been adopted which must give to these solutions a practical value of great interest and weight.

The results are submitted to the service in the surety that they represent a valuable addition to work in a domain of thought which belongs peculiarly to navies.

F. E. Chadwick,
Captain, U. S. N., President.

Naval War College,
Newport, R. I., September 5, 1901.

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SITUATION I.

A state of war existing between France and Great Britain, a descent is made by a French fleet on the English coast, and several undefended towns are bombarded.

The British Government having communicated on the subject with the neutral powers, the diplomatic representatives of the latter at Paris were instructed to address to the French Government identic notes, intimating that the action of the fleet was inconsistent with the rules of The Hague Conference.

The French Government, in its reply, stated that there existed in the several cases special circumstances justifying the course which was adopted:

1. In one case a demand was made upon the town for a ransom, and was refused.

2. In another case a requisition for supplies had been denied.

3. In yet another, the bombardment was an act of retaliation for the destruction of a French man-of-war by an English torpedo boat using false colors.

The French Government, however, while alleging these special justifications, reserved the question of the lawfulness of bombarding undefended coast towns for purposes other than those stated.

To what extent is the supposed French answer, both as to the special cases stated and as to the general question reserved, supported by modern opinion and practice?

SOLUTION.

By Article XXV of the "Regulations respecting the Laws and Customs of War on Land," adopted at The Hague July 29, 1899, "the attack or bombardment of towns, villages, habitations, or buildings which are not defended is prohibited."

Although this prohibition, since it is found in regulations relating only to war on land, could not be considered

expressly applicable to the operations of naval forces, yet it might, if it were unaffected by any other circumstance, be considered as in spirit forbidding such a bombardment as that in question.

But it appears that it was expressly agreed at The Hague that, without regard to the merits, the question should be reserved. In the deliberations of the second subcommittee of the second committee the delegate from Italy proposed that Article XXV should be made applicable to bombardments by naval forces. Objections were made to this proposal (1) because of the incompatibility of an absolute prohibition with the possible necessities of a naval force in regard to obtaining supplies, and (2) because of the inopportuneness of the proposal. The subcommittee, on motion of its president, then expressed the opinion that the matter should be examined by a future conference. The British delegate, however, adverted to the fact that his Government had refused to take part in the Brussels conference (1874) except on condition that naval questions should remain outside the deliberations. He added that he did not desire to touch the merits of the question, but to declare that for the reason indicated it was impossible for him to associate himself with the subcommittee's expression of opinion; and at his request the fact that he abstained from voting on it was entered on the record. (Conférence Internationale de la Paix, part 3, pp. 27–28.)

The conference, in its final act, July 29, 1899, voted certain wishes, among which was the following:

"The conference expresses the wish that the proposal to settle the question of the bombardment of ports, towns and villages by a naval force may be referred to a subsequent conference for consideration."

This wish formed one of five which "were voted unanimously, saving some abstentions," the English delegates having abstained from voting. (Blue Book, Misc. No. 1 (1899), 289.) It appears therefore that there would be no ground for the supposed representation to France, on the part of the neutral governments, in the case stated.

As to the special circumstances alleged in justification of the act complained of, the following observations may be made:

1. By Stockton's Naval War Code, which is binding upon American officers, "the bombardment of unfortified and undefended towns and places for the nonpayment of ransom is forbidden." This provision is believed to represent the best modern opinion and practice, and it invalidates in principle the first excuse.

2. As to the second case, the French answer is unsatisfactory. In general, a belligerent is forbidden to use wanton or disproportionate violence (Hall, 4th ed., 551); and the mere denial of supplies does not give the right to bombard. (Stockton, Naval War Code, 7.) In the present case there is no claim that the bombardment was in any way a military necessity or that it was carried out because requisitioned supplies were forcibly withheld; nor does it appear that due notice of bombardment was given or that any special circumstances, such as might excuse the necessity for notice, existed.

3. The conclusions to be formed as to the third justification depend on several considerations. It does not appear by the French answer whether the torpedo boat, when she fired her first torpedo or gun, had shown her true colors. With reference to the use of false colors, it is laid down "that soldiers clothed in the uniforms of their enemy must put on a conspicuous mark by which they can be recognized before attacking, and that a vessel using the enemy's flag must hoist its own flag before firing with shot or shell." The United States has taken the lead in forbidding the use of false colors (Stockton, Naval War Code, 8); and it is certain that, even in the case of a naval vessel of a government which had not laid a like inhibition upon its officers, the failure to display the true colors before the actual attack would constitute a flagrant violation of the laws of war, which should be brought to the notice of that government and punished by it.

A reasonable opportunity for explanation and reparation should be given, after which, if redress should be neglected or refused, a right of retaliation would arise. If possible, retaliation should be in kind, unless the action was, as in this case, a gross violation of the dictates of humanity and of civilized warfare. (Snow, 93.) At the same time it is enjoined that in making reprisals due regard

must always be had to the duties of humanity (Stockton, Naval War Code, 8); and it would be desirable to perform an act of retaliation which would not, as in the present case, fall upon people apparently sustaining no proximate relation to the perfidy complained of.

NOTES ON SITUATION I—COAST WARFARE.

Paul Jones.—During the year 1776 John Paul Jones, in command of the sloop-of-war *Providence*, 14 guns and 107 men, on a cruise ranging from the Bermudas to Nova Scotia, made several incursions ashore for the purpose of seizing British stores, releasing American prisoners, and destroying British shipping.[1] These incidents, while they convinced him of the essential importance of a navy to the American cause, left on his mind a clear impression "that the best use to be made of the small force that could be put afloat was to direct it, not so much upon the enemy's commerce at sea in transit, as upon his coasts and commercial stations, where his shipping would be found congregated, with insufficient local protection. Commerce destroying, to use the modern phrase for an age-long practice, is a wide term, covering many different methods of application. In essence, it is a blow at the communications, at the resources of the country; in system it should be pursued not by random prowling, by individual ships for individual enemies as they pass to and fro, but by despatching adequate force to important centers, where the hostile shipping for any reason is known to accumulate. * * * Let a single ship of war—commerce destroyer—meet twenty or thirty merchant ships at sea, he can take but few; the rest scatter and escape, and the prisoners must be cared for. Corner the same squadron in port, and neither difficulty, as a rule, exists."[2]

In his statement to the Marine Committee of the Continental Congress on a proposed scheme for the new navy, he advised against ships of the line, on the ground that the United States were not then prepared to contend with Great Britain for mastery of the sea on a grand scale, and recommended the immediate construction of five or six

[1] Buell, Paul Jones, Founder of the American Navy, I, 53.

[2] Captain Mahan, Scribner's Magazine, July, 1898.

frigates, of which fast sailing was to be a prime quality. "Keeping," he said, "such a squadron in British waters, alarming their coasts, intercepting their trade, and descending now and then upon their least-protected ports, is the only way that we, with our slender resources, can sensibly affect our enemy by sea warfare. Rates of insurance will rise; necessary supplies from abroad, particularly naval stores for the British dockyards, will be cut off; transports carrying troops and supply ships bringing military stores for land operations against us will be captured, and last but not least, a considerable force of their ships and seamen will be kept watching or searching for our frigates."[1]

Two descents were made by Jones on the British isles, at Whitehaven and St. Mary's Island. The purpose of the descent at Whitehaven was the destruction of the shipping; of that at St. Mary's Island, the seizure of the Earl of Selkirk as a hostage for the better treatment of American prisoners then in England. The Earl was not at home at the time. Plate, taken from his castle by some of the landing party, was afterwards restored by Jones at his own expense. Whitehaven was defended by two small forts. As to the descent at Whitehaven Jones reported: "Its actual results were of little moment, for the intended destruction of shipping was limited to one vessel. But the moral effect of it was very great, as it taught the English that the fancied security of their coasts was a myth and thereby compelled their Government to take extensive measures for the defense of numerous ports hitherto relying for protection wholly on the vigilance and supposed omnipotence of their navy. It also doubled or more the rates of insurance, which in the long run proved the most grievous damage of all."[2]

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[1] Buell, I, 38–42.

[2] Buell, I, 109–114. As to the case of the Earl of Selkirk, Mr. Buell expresses the opinion that "a project to seize the person of a non-combatant nobleman with a view of holding him as a hostage or of coercing him to use his influence with his Government for the better treatment of prisoners of war, fairly captured, can hardly be brought within the most liberal definition of civilized warfare," and that "the fact that it had many examples in the conduct of British landing parties on our own coast is no justification," as "two wrongs do not make one right."

Landings at different points on the British coasts were planned for the expedition in the *Bon Homme Richard*, in 1779, but in deference to French wishes these were abandoned and a cruise against commerce in the open sea made instead.[1]

War of 1812.—The later stages of the war of 1812 were marked by incursions of the British naval forces at various points on the coast of the Chesapeake Bay, in retaliation for acts of the United States troops in Canada.[2] The threat of Admiral Cochrane to enter upon such a course was the subject of a correspondence between him and Mr. Monroe, then Secretary of State, in August and September, 1814.[3] But in April and May, 1813, several towns along the Chesapeake were devastated by the forces under Rear-Admiral Cockburn, when the plea of retaliation was not alleged.[4] It appears that Cockburn's orders were to destroy everything that could serve a warlike purpose, and to interrupt, as far as possible, communication along the shore.[5] On April 28 he reached Frenchtown, a village of a dozen buildings, where he drove away the few Americans who made a show of resistance, and burned a quantity of property, "consisting of much flour, a large quantity of army clothing, of saddles, bridles, and other equipments for cavalry, etc., together with various articles of merchandise," besides five vessels lying near the place.[6]

The first destruction of the town itself took place at Havre de Grace, a place of some sixty houses. The immediate object of the attack was the destruction of a battery lately erected there. The British forces "met with only resistance enough to offer an excuse for pillage."[7] The battery was soon silenced, and the boat's crew having landed drove the militia to the further extremity of the

[1] Captain Mahan, Scribner's Magazine, XXIV, 34.

[2] Adams' History of the United States, VIII, 124–128.

[3] Am. State Papers, For. Rel., III, 693–694.

[4] Reports of Rear-Admiral Cockburn to Admiral Warren, James' History of the War in America, II, 404–411.

[5] Adams, VII, 266, citing London Gazette, July 6, 1813.

[6] Adams, VII, 266–267, citing the London Gazette.

[7] Adams, VII, 267.

town, where, according to Cockburn's report, "no longer feeling themselves equal to an open and manly resistance, they commenced a teasing and irritating fire from behind the houses, walls, trees, etc., from which, I am sorry to say, my gallant first lieutenant received a shot through his hand whilst leading the pursuing party; he, however, continued to head the advance, with which he soon succeeded in dislodging the whole of the enemy from their lurking places and driving them for shelter to the neighboring woods. * * * After setting fire to some of the houses, to cause the proprietors (who had deserted them and formed part of the militia who had fled to the woods) to understand and feel what they were liable to bring upon themselves by building batteries and acting towards us with so much useless rancor, I embarked."[1] According to an American account of the affair, the militia, on the killing of a man by a rocket, fled precipitately, and the marines then proceeded to plunder and burn the houses, of which about forty were destroyed. This account gives the impression that there was little, if any, firing from the houses.[2]

Subsequently the villages of Georgetown and Fredericktown were destroyed. In his report concerning them Admiral Cockburn makes no mention of irregular firing. He says:

"I sent forward the two Americans in their boat to warn their countrymen against acting in the same rash manner the people of Havre de Grace had done, assuring them, if they did, that their towns would inevitably meet with a similar fate; but, on the contrary, if they did not attempt resistance, no injury should be done to them or their towns; that vessels and public property only would be seized; that the strictest discipline would be maintained; and that, whatever provisions or other property of individuals I might require for the use of the squadron, should be instantly paid for in its fullest value. * * * I am sorry to say, I soon found the more unwise alternative was adopted; for on our reaching within about a mile of the town, between two projecting elevated points of the river,

[1] James, II, 406. [2] North Am. Rev., V. (July, 1817), 157.

a most heavy fire of musketry was opened on us from about 400 men, divided and entrenched on the two opposite banks, aided by one long gun. The launches and rocket boats smartly returned this fire with good effect, and with the other boats and marines, I pushed ashore immediately above the enemy's position, thereby ensuring the capture of the town or the bringing him to a decided action. He determined, however, not to risk the latter, for the moment he discerned we had gained the shore, and that the marines had fixed their bayonets, he fled with his whole force to the woods, and was neither seen nor heard of afterwards, although several parties were sent out to ascertain whether he had taken up any new position, or what had become of him. I gave him, however, the mortification of seeing, from wherever he had hid himself, that I was keeping my word with respect to the towns, which (excepting the houses of those who had continued peaceably in them, and had taken no part in the attack made upon us) were forthwith destroyed."

In these affairs, Admiral Cockburn seemed to have acted on the old idea that where a useless defense is made, those who resist are not entitled to the privileges of belligerents. "Where he met no resistance he paid in part for what private property he took."[1]

Bombardment of Greytown, or San Juan del Norte.— In March, 1852, the Mosquito authorities, by a proclamation issued by the British consul, called on the people of "Greytown," a name which had been given to the town of San Juan del Norte, in Nicaragua, to form a constitution and set up a government. This government came into power on May 1, 1852, the Mosquito authorities surrendering their functions and retiring from office. A controversy soon broke out between the new authorities and the Accessory Transit Company, an organization composed of citizens of the United States who held a charter from Nicaragua, as to the occupation by the company of a portion of land on the north side of the harbor known as Punta Arenas, over which jurisdiction was claimed by the municipality. Greytown was regarded by the United States as being within the limits of Nicaragua. It was

[1] Adams, VII, 269; North Am. Rev., V, 157, July, 1817.

understood to claim independence under a charter from the Mosquito King; but the United States never recognized the Mosquito King nor the independence of the town, though American naval officers were instructed to respect the police regulations of any de facto authorities there, and not to molest such authorities unless they should attempt to disturb the rights of American citizens.

February 8, 1853, the city council passed a resolution notifying the Accessory Transit Company to remove certain buildings within five days and its entire establishment within thirty days, and declaring that if this was not done summary measures would be taken, as the land was needed for public uses. The buildings which were to be removed within five days were a structure used for boarding and lodging the employees of the company and a brick oven belonging to one McCerren, a citizen of the United States, who at the time was absent. They were not removed; and on February 21 they were demolished by a party of armed men, who, accompanied by the marshal of Greytown, and under the joint command of a member of the city council and "Major" Lyons, a colored resident, "acted in a most outrageous manner, not even permitting the clerks of the company to save the property in the house, and actually imprisoned and fined one of them for attempting to rescue some valuable articles from destruction."[1] When, a few days later, Mr. Baldwin, the agent of the company, went to Greytown to invoke the protection of a British man-of-war, he was arrested and held some time in custody.[2]

March 10, 1853, Capt. Hollins, of the U. S. S. *Cyane*, arrived at Greytown. The agent of the company immediately invoked his protection, and he promptly advised the mayor of the town that he could not permit any depredations on the property of the company. The mayor replied that no "depredations" had been or would be made upon the property of the company, but that he should proceed to eject the company according to law, unless illegally prevented by a superior force. It was

[1] Capt. Hollins to the Secretary of the Navy, March 30, 1853, Br. & For. State Papers, XLVII, 1033–1044.

[2] Br. & For. State Papers, XLVII, 1019.

afterwards learned that a force from the town was under arms, preparing to proceed against Punta Arenas and the Accessory Transit Company, and that the destruction of the company's property by fire was threatened. Capt. Hollins then placed a marine guard on Punta Arenas, with instructions to inform the "marshal" that the property could not be molested. When the marshal landed he was so advised, and he then mustered his "posse of carpenters" and returned to Greytown. In consequence of many threats and manifest excitement among the citizens of the town, Capt. Hollins continued the guard at Punta Arenas and warned the citizens of Greytown of his intention to protect the persons and property of citizens of the United States against molestation. His proceedings were approved by the Secretary of the Navy.[1]

In consequence of the dispute as to jurisdiction over Punta Arenas, the difficulties between the municipality and the Accessory Transit Company continued. Early in May, 1853, some men, who were then or had previously been employed by the company, ran off with some of its property in a boat to Greytown. They were pursued by employees of the company, who, while attempting to arrest the fugitives, were compelled by the municipal police to desist. Subsequently a clerk of the company who, under orders of the agent, sought to recover the boat was forcibly interrupted by the police, and was obliged to leave behind some of the stolen property, which afterwards disappeared. On the same day a warrant was issued for the arrest, on a charge of assault and battery, of one of the employees who had endeavored to seize the fugitives. The agent of the company, on jurisdictional grounds, refused to allow the service of the warrant at Punta Arenas, but the marshal returned and effected the arrest with a force of armed men. The prisoner, whose name was Sloman, was taken to Greytown, where Mr. Fabens, the U. S. commercial agent, procured his discharge under bond. The company's agent was afterwards arrested at Greytown and held to bail on a charge of having obstructed Sloman's arrest at Punta Arenas.[2]

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[1] Br. and For. State Papers, XLVII, 1012–1018.

[2] British and Foreign State Papers, XLVI, 859.

Disputes also existed as to the payment of dues and port charges by the steamers of the Accessory Transit Company. The agent of the company finally instructed the officers of the steamers to pay no more port charges at Greytown and to take no letters or packages or freight for its inhabitants. This action much exasperated the people of the town.

On the evening of May 16, 1854, a difficulty of more serious import occurred. The population of Greytown then numbered about 300 persons, consisting of a few Englishmen, Frenchmen, Germans, and men from the United States, but mainly of negroes from Jamaica and some natives of the Mosquito shore. On the day mentioned the steamer *Routh*, of the Accessory Transit Company, arrived at Punta Arenas under the command of Capt. T. T. Smith, and took her position alongside the steamer *Northern Light* to deliver her passengers. About dusk a bungo, having on board 25 or 30 armed men, mostly Jamaica negroes headed by a mulatto as marshal, came over from Greytown and ran alongside the *Routh*. The marshal, accompanied by several armed men, then jumped on board and announced their purpose to arrest Captain Smith under a warrant from the mayor of Greytown on a charge of murder, based upon the shooting by Captain Smith of a native boatman.

At this stage of the proceedings Mr. Borland, United States minister to Central America, who was on board the *Northern Light* on his way to the United States, was appealed to. He went on board the *Routh* and found Capt. Smith standing at his cabin door, keeping the marshal and his men at bay. Mr. Borland informed the marshal that the United States did not recognize the authority of the municipality at Punta Arenas to arrest an American citizen, and ordered him with his men to withdraw. Meanwhile, loud and threatening language was used by the men on the bungo, and several of them rushed on board the steamer. A further invasion was prevented by Mr. Borland taking a rifle and warning the men on the bungo to keep off.

Early in the evening Mr. Borland went to Greytown to call upon Mr. Fabens, the United States commercial agent.

He then learned that, at a meeting of the people of the town, it had been resolved to arrest him. This meeting was presided over by the mayor, a Frenchman named Signad, who, though he afterwards disavowed responsibility for what took place, was said to have been present when it was proposed by Martin, the ex-mayor, to make the arrest. The attempt was made. A body of men, consisting in part of the regular police of the town, armed with muskets, and headed by a Jamaica negro, went to Mr. Fabens's house and announced that they came by order of the mayor to arrest Mr. Borland for preventing the arrest of Capt. Smith. Mr. Borland appeared and warned them against the consequences of what they proposed, and called several gentlemen who were in an upper room to witness the threatened assault upon him. The leader of the armed force then summoned Martin, the ex-mayor, as if to consult him, but Martin not answering, they drew off a little way from the door. The mayor then came up and assured Mr. Borland that the proceedings had been taken without his order and authority; and while the conversation was going on someone from the crowd threw a broken bottle at Mr. Borland, slightly wounding him in the face. The person who threw the missile was not recognized. Soon afterwards the crowd dispersed. At Mr. Borland's request, Mr. Fabens proceeded in a boat to the *Northern Light* in order if possible to obtain aid. On deliberation, it was decided that a committee of three passengers should return with Mr. Fabens to Greytown, communicate with Mr. Borland and agree upon a proper course to be taken. The boat bearing them, though notice was given that the consul was on it, was fired on and not allowed to land, and was thus compelled to return to the *Northern Light*. During the night the town was occupied by armed men, whose sentinels, stationed between the American consulate, where Mr. Borland was, and the harbor, challenged all who attempted to pass, prevented boats from landing or leaving the shore, and thus kept Mr. Borland a prisoner all night. On the following morning, between seven and eight o'clock, Mr. Borland, taking advantage of a momentary lull in the excitement, procured a boat and returned to the *Northern Light*, where it was decided, at a meeting of the passen-

gers, to engage the services of fifty men to act as an armed guard at Punta Arenas till the United States Government could be informed of the state of affairs.[1]

Mr. Marcy, who was then Secretary of State, on June 3, 1854, informed Mr. Fabens that a man-of-war would be ordered to visit San Juan; that the conduct of the people there had attracted the attention of the Government of the United States and would not pass unnoticed; and that the inhabitants of the place would be expected to make reparation for the wrongs and outrages they had committed. On the 9th of June he advised Mr. Fabens that Capt. Hollins would immediately proceed to San Juan. The Government, said Mr. Marcy, was embarrassed by the rumor that the pretended civil and political authority of the place had dissolved; nevertheless, should there be no organized body upon which a demand for redress could be made, the individuals who had participated in the infliction of the wrongs could not escape from responsibilities resulting from the conduct of the late political organization. The people of San Juan were expected to repair the injury they had caused to the Accessory Transit Company by withholding from it the property which had been stolen and taken to San Juan, and by protecting persons who were guilty of felony. Moreover, the indignity to Mr. Borland could not, declared Mr. Marcy, pass unnoticed. If done by order of the authorities of the place, they must answer for it in their assumed political character, and nothing short of an apology for the outrage would save the place from the infliction that such an act merited. If it was committed by lawless individuals, without the authority or connivance of the town, then it was clearly the duty of those who exercised the civil power in San Juan to inflict upon them exemplary punishment. The nominal magistrates there, in neglecting to bring them to justice, would impliedly sanction their acts and assume responsibility for them.[2]

The instructions of Mr. Dobbin, Secretary of the Navy, to Capt. Hollins bear date June 10, 1854. They refer to the two incidents of the stealing of the company's property

[1] Br. and For. State Papers, XLVI, 866–872.

[2] Br. and For. State Papers, XLVI, 847.

and the indignity to Mr. Borland. Capt. Hollins was to consult freely with Mr. Fabens. It was, declared the instructions, very desirable that the people of Greytown "should be taught that the United States will not tolerate these outrages, and that they have the power and determination to check them. It is, however, very much to be hoped that you can effect the purposes of your visit without a resort to violence and destruction of property and loss of life. The presence of your vessel will, no doubt, work much good. The Department reposes much in your prudence and good sense."[1]

June 12, 1854, Mr. Fabens informed Capt. Hollins, who had then arrived at San Juan, that he had demanded, on behalf of the United States, an indemnity for the property feloniously taken from the Accessory Transit Company. He had also renewed the demand for indemnity for the destruction of the company's property in March, 1853. He had learned that, although a second demand for satisfaction had been made, no redress would be given; nor would any apology be made by the town or its authorities for the insult to Mr. Borland, nor would any steps be taken to bring the perpetrators to justice. He added that the chief actors and instigators were in undisputed possession of the town, its arms and ammunition, and the people were thus virtually countenancing and approving the indignity.[2]

On July 12 Capt. Hollins, at 9 o'clock in the morning, issued a proclamation announcing that, if the demands for satisfaction presented by Mr. Fabens were not forthwith complied with, he would, at 9 o'clock a. m. of the following day, proceed to bombard the town. The particular demands in question were those specified in a letter of Mr. Fabens, of July 11, addressed "To those now or lately pretending to and exercising authority in and to the people of San Juan del Norte." They comprised the immediate payment of $24,000 as an indemnity for injuries to the Accessory Transit Company and for outrages perpetrated on the persons of American citizens, and an

[1] Br. and For. State Papers, XLVI, 875.

[2] Br. and For. State Papers, XLVI, 877.

apology for the indignity to Mr. Borland, together with satisfactory assurances of future good behavior.

After the issuance of the proclamation, a force went ashore from the *Cyane* and secured the arms and ammunition on shore. At the same time foreigners generally, and persons favorable to the United States, were notified that a steamer would be in readiness on the morning of the bombardment to convey them to a place of safety. An offer was also made to Commander Jolley, of the British war schooner *Bermuda*, of assistance in removing any British persons or property. He responded with the following protest:

"The inhabitants of this city, as well as the houses and property, are entirely defenseless and at your mercy. I do, therefore, notify you, that such an act will be without precedent among civilized nations; and I beg to call your attention to the fact that a large amount of property of British subjects, as well as others, which it is my duty to protect, will be destroyed; but the force under my command is so totally inadequate for this protection against the *Cyane*, I can only enter this my protest."

Capt. Hollins at once replied:

"The people of San Juan del Norte have seen fit to commit outrages upon the property and persons of citizens of the United States after a manner only to be regarded as piratical, and I am directed to enforce that reparation demanded by my Government. Be assured I sympathize with yourself in the risk of English subjects and property under the circumstances, and regret exceedingly the force under your command is not doubly equal to that of the *Cyane*."

A steamer was sent to the town at daylight on the morning of the 13th to take away such persons as desired to go. A few only accepted the opportunity, and these were conveyed to Punta Arenas. The majority of the inhabitants either had left or were willing to remain and risk the consequences. It was hoped that the show of determination on the part of the ship would at this stage have brought about a satisfactory adjustment of differences; but none of the inhabitants called upon Capt. Hollins, and no explanation or apology was attempted.

At 9 o'clock in the morning of the 13th the batteries of the *Cyane* were opened on the town with shot and shell for three-quarters of an hour. After an intermission of the same length they were opened again for half an hour, and this was followed by an intermission of three hours, after which the firing was renewed for twenty minutes, and then the bombardment ceased. The object of the several intervals in the bombardment was to afford an opportunity to the people of the town to treat and arrange matters. No advantage was taken of it, and at four o'clock p. m. a force was sent ashore to complete the destruction of the town by fire, though instructions were given to exempt from destruction, if possible, the property of a Frenchman named De Bardwell, who was understood to have held aloof from the action of the people. No lives were lost, although an attack was made by an armed party on the men who were sent ashore; but on the volley being returned the assailants fled. "The execution," says Capt. Hollins, "done by our shot and shell amounted to the almost total destruction of the buildings; but it was thought best to make the punishment of such a character as to inculcate a lesson never to be forgotten by those who have for so long a time set at defiance all warnings, and satisfy the whole world that the United States have the power and determination to enforce that reparation and respect due to them as a Government in whatever quarter the outrages may be committed."[1]

This transaction was fully discussed in President Pierce's second annual message of Dec. 4, 1854, which contains the following comments:

"This pretended community, a heterogeneous assemblage gathered from various countries, and composed for the most part of blacks and persons of mixed blood, had previously [to the mobbing of Mr. Borland] given other indications of mischievous and dangerous propensities. Early in the same month property was clandestinely abstracted from the depot of the Transit Company and taken to Greytown. The plunderers obtained shelter there and their pursuers were driven back by its people,

[1] Br. and For. State Papers, XLVI, 878, et seq.

who not only protected the wrongdoers and shared the plunder, but treated with rudeness and violence those who sought to recover their property. * * * I could not doubt that the case demanded the interposition of this Government. Justice required that reparation should be made for so many and such gross wrongs, and that a course of insolence and plunder, tending directly to the insecurity of the lives of numerous travelers and of the rich treasure belonging to our citizens passing over this transit way, should be peremptorily arrested. Whatever it might be in other respects, the community in question, in power to do mischief, was not despicable. It was well provided with ordnance, small arms, and ammunition, and might easily seize on the unarmed boats, freighted with millions of property, which passed almost daily within its reach. It did not profess to belong to any regular government, and had, in fact, no recognized dependence on or connection with any one to which the United States or their injured citizens might apply for redress or which could be held responsible in any way for the outrages committed. Not standing before the world in the attitude of an organized political society, being neither competent to exercise the rights nor to discharge the obligations of a government, it was, in fact, a marauding establishment too dangerous to be disregarded and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws or a camp of savages depredating on emigrant trains or caravans and the frontier settlements of civilized states. * * * No individuals, if any there were, who regarded themselves as not responsible for the misconduct of the community adopted any means to separate themselves from the fate of the guilty. The several charges on which the demands for redress were founded had been publicly known to all for some time, and were again announced to them. They did not deny any of these charges; they offered no explanation, nothing in extenuation of their conduct, but contumaciously refused to hold any intercourse with the commander of the *Cyane*. By their obstinate silence they seemed rather desirious to provoke chastisement than to escape it. * * * When the *Cyane*

was ordered to Central America it was confidently hoped and expected that no occasion would arise for a "resort to violence and destruction of property and loss of life." Instructions to that effect were given to her commander; and no extrême act would have been requisite had not the people themselves, by their extraordinary conduct in the affair, frustrated all the possible mild measures for obtaining satisfaction. * * *

"This transaction has been the subject of complaint on the part of some foreign powers, and has been characterized with more of harshness than of justice. If comparisons were to be instituted, it would not be difficult to present repeated instances in the history of states standing in the very front of modern civilization where communities far less offending and more defenseless than Greytown have been chastised with much greater severity, and where not cities only have been laid in ruins, but human life has been recklessly sacrificed and the blood of the innocent made profusely to mingle with that of the guilty."

The Government of the United States declined to entertain the claims of French subjects, growing out of the bombardment, on the ground that persons domiciled at Greytown must look to that community for protection.[1]

It is to be noticed that President Pierce, in the passages above quoted, clearly assumed the position that the inhabitants of Greytown were not as a body entitled to be treated as a civilized and responsible community.

The Crimean War.—In the *Moniteur* of May 6, 1854, is given the report of the French admiral on the bombardment of Odessa, which had taken place on April 22. It was claimed that a flag of truce had been fired on and that the bombardment was in retaliation. The bombardment was directed at the public establishments, the public vessels, and the fortifications, the city itself and the merchant vessels being spared. The admiral mentions the fact that his orders had directed him to spare open towns.

At pp. 331–347 of the British Expedition to the Crimea, by W. H. Russell, the London *Times* correspondent, is

[1] Mr. Marcy, Sec. of State, to Count Sartiges, French minister, Feb. 26, 1857, S. Ex. Doc. 9, 35 Cong. 1 sess.; Lawrence's Wheaton (1863), 173, note 59.

given the history of the expedition to the Sea of Azov. During this expedition numerous landings were made along the shore, and extensive plundering was engaged in. These proceedings are referred to by a writer in the *Times*, Aug. 31, 1888, who signs *Haud Ignarus Mali*. He states that at various places on the Sea of Azov large stores of corn, private property, were burnt, and that the English press approved rather than condemned what was done.

Bombardment of Valparaiso.—The series of events which culminated in the bombardment of Valparaiso by a Spanish squadron, March 31, 1866, originated in a controversy between Spain and Peru, known as the "Talambo" question, and involving alleged delays, defaults, and denials of justice in the administration of the criminal law by the tribunals of the latter country.[1] On the refusal of Peru to comply with certain demands for redress, as well as to receive and negotiate with a new diplomatic agent of Spain, on whose life attempts were alleged to have been made by Peruvians, a Spanish squadron took possession of the Chincha Islands. Any design against the territorial integrity of Peru was afterwards disclaimed, but the seizure of the islands was accompanied with a manifesto in which it was intimated that, as Spain had never acknowledged the independence of Peru, she might rightfully reassert her ancient title to them.[2]

When intelligence of these things reached Chile it produced great excitement, and every effort was made to force the Government into a warlike attitude. May 4, 1864, Señor Tocornal, then Chilean minister for foreign affairs, addressed to the Governments of America a circular in which he declared that the manifesto issued by the Spanish representatives in Peru sanctioned principles which placed in doubt the independence of that country and must therefore be reprobated and protested against by Chile, and he expressed confidence that the Spanish Government would not approve it. This circular, however, was not considered sufficiently demonstrative; and on May 7 Señor Tocornal, yielding to popular clamor, resigned. He was succeeded by Señor Covarrubias. It

[1] Dip. Cor., 1864, IV, 15, 18.

[2] Dip. Cor., 1864, IV, 23, 32, 35, 87, 89.

was understood that orders were issued to officials along the coast to refuse supplies and coal to Spanish men-of-war, and in the following September a decree was promulgated declaring coal to be contraband of war and directing that supplies of it be withheld from public vessels of a state employed in hostilities against another state.[1]

The relations between Spain and Chile were soon aggravated by various incidents. Instructions were issued to Admiral Pareja, commanding the Spanish forces in the Pacific, which invested him with plenipotentiary powers. The Spanish minister at Santiago, Mr. Tavira, sought, however, to effect an amicable arrangement. In a note of May 13, 1865, he set forth the grievances of his Government. The note complained of popular affronts to the Spanish flag, at which officials were alleged to have connived; of Mr. Tocornal's circular of May 4; of the failure to correct expressions of public opinions which contravened the law; of the permission given to the Peruvian war steamer *Lerzundi* to obtain munitions of war and supplies and to enlist men, while obstacles were placed in the way of sending supplies to the Spanish squadron; of the failure to prevent unlawful expeditions; of the refusal to allow Spanish steamers to take coal, and of the decree declaring coal to be contraband of war, with the object of prejudicing Spain; of the subsequent permission given to Peru to purchase horses, which were contraband of war by the law of nations; and of the failure to bring actions for certain libels in the press. Mr. Tavira stated that his Government would be willing to receive "the solemn declarations" which the case demanded, provided they were compatible with its dignity. Mr. Covarrubias replied on May 16, 1865, reviewing the subjects of complaint, flattering himself that he had dissipated them, and declaring that his explanations were a fresh testimonial to the constant yearning and efforts of his Government to maintain friendly relations with Spain. Mr. Tavira responded, on May 20, saying that the explanations given dissipated, in his judgment, all motives of complaint, and that he would advise his Government of them.

[1] Dip. Cor., 1864, IV, 179–183, 189–190.

The Spanish Government repudiated Mr. Tavira's action and charged him with antedating the note of May 13, in order to make it appear that it was sent before the arrival of instructions which he received on the 14th of that month. He was removed from his post and ordered home. The terms of settlement insisted upon in the instructions embraced disapproval of or apology for the grievances of Spain, and a salute to the Spanish flag, which would be immediately returned and no indemnity asked. If these terms were refused Admiral Pareja was authorized to take measures of another kind, Spain reserving the right to exact indemnities for the past and guarantees for the future.[1]

Admiral Pareja was instructed, if Chile refused the demands of Spain, to address, in the first place, a circular to all the Spanish-American Republics assuring them that Spain had no designs on their territory or independence. He was then to put the whole Chilean coast under blockade. This blockade was to continue one month, and if Chile had not then accepted the conditions offered by Spain he was authorized to perform any and every other hostile act against the power and prosperity of Chile recognized as legitimate in a state of war, throwing upon the Chilean Government the responsibility. The point on which Spain specially insisted was the salute to her flag, which she felt had been insulted. If such a salute was given, it would be immediately returned by the Spanish fleet, a new minister would instantly be sent to Santiago, and the Spanish forces would be withdrawn from the Pacific. The Spanish minister of state repeatedly declared that his Government would not permanently occupy any Spanish-American territory.[2]

September 17, 1865, Admiral Pareja, who, although a diplomatic agent of Spain then resided at Santiago, was invested with plenipotentiary powers, sent an ultimatum to the Chilean Government, demanding satisfactory explanations, with a salute of 21 guns to the Spanish flag, and intimating that if his demands were not complied with

[1] Dip. Cor., 1865, II, 545–552.

[2] Dip. Cor., 1865, II, 546–547, 556, 557.

diplomatic relations would be broken off, and that, if his forces were called into action, he would claim indemnity for injuries sustained by the Spanish squadron in consequence of the decrees of the Chilean Government. This ultimatum, signed by the Spanish admiral, was received at Santiago on the 18th of September, during the celebration of the fifty-fifth aniversary of the birth of the Republic. It was immediately rejected. It was presented again by the admiral, and on the 23d of September was again rejected. Next day Valparaiso was blockaded and a blockade was proclaimed of the other ports of the Republic. Chile responded by a declaration of war. The extended blockade was not in fact maintained, since there were fifty-three ports, while the Spanish forces comprised only four frigates and two smaller vessels. October 28, 1865, Admiral Pareja reduced the blockade to six ports.[1]

Early in the contest the Chileans were greatly elated by the capture of the Spanish man-of-war *Covadonga*. This mishap caused deep mortification both to the Spanish navy and to the Government at Madrid. The Spanish force in Chilean waters was reenforced by two ships, which were withdrawn from Callao, notwithstanding the fact that in Peru, whose own dispute with Spain had seemed to be amicably adjusted, there had just taken place a sympathetic revolution which presaged an alliance with Chile.[1] At the end of December, 1865, the death of Admiral Pareja on board his flagship was announced: the United States minister at Santiago reported that from what he could gather the admiral had committed suicide. His military operations had entirely failed; and it was generally believed that a joint Chilean-Peruvian fleet, which was to include the *Covadonga*, was fitting out at the island of Chiloe.

Admiral Pareja was succeeded in command by Señor Castro Mendez Nuñez, captain of the iron-clad *Numancia*, the most formidable of the Spanish ships. He reduced the blockade to the ports of Caldera and Valparaiso, and later to Valparaiso alone. In January, 1866, news reached Chile of the conclusion of an alliance with Peru, and of

[1] Dip. Cor., 1866, II, 345, 349–362. [2] Dip. Cor., 1866, II, 364–365.

the declaration of war by the latter. This alliance was joined by Ecuador and Bolivia. February 7 the Spanish fleet endeavored to engage that of Chile and Peru near the island of Chiloe, and was worsted.

The first intimation of a possible bombardment of Valparaiso was made by Admiral Pareja in October, 1865, but nothing came of it. In February, 1866, his successor caused the Chilean Government to be advised that in the event of an attempt being made from the town to destroy his vessels with torpedoes he would instantly open fire upon it.[1] Personally Admiral Nuñez seems to have been desirous of an amicable arrangement, and of avoiding such a measure of violence. About the middle of March, however, he received a formal appointment as commander in chief and plenipotentiary, and this was accompanied with or was soon followed by instructions which left him no other alternative. General Kilpatrick, then United States minister to Chile, and Commodore John Rodgers, commanding a special United States squadron at Valparaiso, labored in vain to bring about a pacific adjustment. Admiral Nuñez stated that the only terms which his instructions would permit him to accept were (1) a note disclaiming an intention to insult Spain, and declaring that the treaty of peace was only interrupted, not broken, by

[1] March 3, 1866, Admiral Denman wrote to the Lords Commissioners of the Admiralty that he intended to use two of his ships to enforce twenty-four hours' delay before the Spanish squadron should open fire on Valparaiso, in the event of the use of torpedoes against the Spanish ships. (Br. & For. State Papers, LVI, 937.) This intention the Lords considered "not to be justified by any rule of international law." April 16, 1866, Lord Clarendon instructed the British minister in Chile that he had consulted the law offices of the crown on the subject, and that in the opinion of Her Majesty's Government the course which the Spanish admiral had declared he would pursue would, under the circumstances stated, "be justifiable by international law." "Her Majesty's Government," said Lord Clarendon, "think it impossible to deny the belligerent right of Chile to employ torpedoes against the Spanish squadron: and equally impossible to deny the belligerent right of Spain to bombard the town which those instruments are employed to protect. In the opinion of Her Majesty's Government, however, it would be highly impolitic on the part of the Chilean Government to give cause to the Spanish commodore to put his threat into execution." (939.)

the declaration of war, and in proof of this the return of the *Covadonga*, and all other prizes; (2) a responsive declaration by Spain of a return of friendship, together with a disclaimer of any desire for conquest in America, or of exclusive influence in American Republics, and in proof of this the return of all prizes in the possession of the Spanish squadron; (3) after this exchange of notes, a reciprocal salute of 21 guns, the first gun to be fired from the Chilean forts, when, this accomplished, he would proceed to Santiago and present his credentials as envoy extraordinary and minister plenipotentiary and enter into negotiations for a permanent settlement. If these terms were accepted by Chile, similar ones would be offered to her allies.

Mr. Covarrubias, when advised of these terms, declined to act upon them without the concurrence of the representatives of the allies. This was construed as a rejection of them, and it seems correctly so, since not only was the minister of Peru then absent, but Mr. Covarrubias, as will be seen, soon afterwards made a counter-proposal which was evidently not the result of mutual consultation.

On the morning of March 27 Admiral Nuñez notified the diplomatic corps, the dean of the consular body at Valparaiso, and the intendente of the city that he would open his batteries on Saturday morning, the 31st of the month, thus allowing four days to noncombatants for removing with their effects, and that he would endeavor to injure only public property, but that if private property should be destroyed he could only place the entire responsibility on Chile. In a manifesto he stated that two ineffectual attempts had been made to engage the allied fleets in the waters of Chiloe, where they were protected by narrow passages and natural bulwarks of rock, so that vessels of the class of the Spanish squadron could not attack them. "The impossibility," he declared, "of getting within gunshot of vessels which shelter themselves behind the impassable barriers of locality, and the persistence of Chile in refusing the amends justly demanded of her, impose upon Spain the painful but unavoidable duty of making her feel all the weight of rigor to which that country exposes itself which absolutely refuses to

recognize the duties imposed upon the civilized communities of the universe."

The foreign residents of various nationalities addressed petitions and sent deputations to the foreign ministers and to the commanders of the foreign naval forces, praying for protection against the bombardment. Gen. Kilpatrick convoked a meeting of the diplomatic corps, but only the representatives of Italy and Prussia appeared; and it was decided that it was inexpedient for the American naval forces to make any physical opposition, in view of the course of the ministers of England and France. "Had those representatives," says Gen. Kilpatrick, "asked that our forces cooperate with those of England to that end, and thus given us moral support in our contemplated action, neither Commodore Rodgers nor myself would have hesitated to have used force to prevent the destruction of this city."

All the consular body, except the representatives of the Argentine Republic, Belgium, England, and France, joined in a protest to Admiral Nuñez, "In the face of the civilized world, against the consummation of an act which is inconsistent with the civilization of the age." The consuls of England, France, and the Argentine Republic made a joint and similar protest. The Belgian consul protested separately.

General Kilpatrick, in a written communication to Admiral Nuñez, said: "While belligerent rights permit a recourse to extreme measures for the carrying out of legitimate military operations, they do not include the wanton destruction of private property where no result advantageous to the lawful ends of the war can be attained. International law expressly exempts from destruction purely commercial communities, such as Valparaiso, and the undersigned would beg his excellency to consider most earnestly the immense loss to neutral residents, and the impossibility of removing within the brief term alloted to them their household goods, chattles, and merchandise. If, however, his excellency persists in his intention * * * it only remains for the undersigned to reiterate in the clearest manner, in the name of his Government, his most solemn protest against the act as unusual and

unnecessary, and in contravention of the laws and customs of civilized nations; reserving to his Government the right to take such action as it may deem proper in the premises."[1]

The British minister, Mr. Thomson, in a similar protest, drew attention to the large neutral interests at stake and the impossibility of withdrawing them in four days, and to the futility of the proposed measure from a military point of view; and, reserving all the rights of his Government in the premises, he declared: "In attacking an open and undefended town an act will be committed against the laws and usages of war, against the rules established by international law, and against the laws of humanity."[2]

The diplomatic representatives of France, Italy, and Prussia also protested.[3]

On the morning of March 29 General Kilpatrick advised Mr. Covarrubias that Admiral Nuñez was disposed to say to the intendente of Valparaiso that, inasmuch as it was a purely commercial and unfortified port, the magnanimity of Spain would not permit its destruction if Chile, in reply, would state that she yielded to magnanimity what she refused to yield to force. Mr. Covarrubias answered by proposing that, as Adm. Nuñez had given as a reason for the bombardment that he could not meet the vessels of the allies, their squadron should be placed 10 miles from Valparaiso, there to engage an equal force from the Spanish fleet (the *Numancia* being excluded), Commodore Rodgers to match the ships and act as umpire. Admiral Nuñez declined this proposal, saying that as a military man he knew the superiority of his forces and should of course avail himself of it.[4]

On the morning of March 31 the bombardment took place, lasting three hours. The shots were chiefly directed at the public buildings—the bonded warehouses, the intendencia, and the railway station. Four of the warehouses were destroyed, containing neutral property valued at $10,000,000. White flags were at the Admiral's request

[1] Dip. Cor., 1866, II, 402.

[2] Br. & For. State Papers, LVI, 966.

[3] Dip. Cor., 1866, II, 386–393.

[4] Dip. Cor., 1866, II, 391, 392, 404–405.

placed on the hospitals and churches, but some of these were struck. A part of the streets Planhada and Cocharne, extending from the intendencia toward the customs stores, was destroyed by fire, and some twenty-five private dwellings were consumed. The total loss was estimated at $15,000,000, less than 5 per cent of which fell on Chileans. Two or three persons were killed and as many wounded.[1]

Mr. Seward, in acknowledging General Kilpatrick's dispatches, said: "The conclusion at which you arrived . . . that it was not your duty to advise and instruct Commodore Rodgers to resist the bombardment by force is accepted and approved."[2] Subsequently Mr. Seward, in a letter to the Attorney-General, expressed the opinion that citizens of the United States domiciled in Valparaiso would have no claim for indemnity either against Spain or against Chile,[3] and the Attorney-General gave to this view his sanction.[4]

Mr. Welles, Secretary of the Navy, in his annual report of Dec. 3, 1866, stated that Commodore Rodgers "was not required to interpose his force against or for either party;" that it was "his duty, even while endeavoring to mitigate the harsh severities of war, to maintain a strict neutrality;" and that, "the officers of other neutral powers having declined to unite in any decided steps to protect the city, no alternative remained for him to pursue consistently with the position of this Government towards the parties than that which he adopted."[5]

Lord Clarendon, on hearing of the bombardment, described it in a communication designed for the Spanish Government as "a wanton destruction unparalleled in modern times and unjustifiable on any grounds of a vast amount of neutral property stored up in the magazines of a defenceless town, without any material damage to the

[1] Dip. Cor., 1866, II, 386–393; Br. & For. State Papers, LVI, 971. For a circular of Mr. Covarrubias of April 1, 1866, on the bombardment, see Dip. Cor., 1866, II, 421.

[2] Dip. Cor., 1866, II 411–412.

[3] Aug. 24, 1866, 74 MS. Dom. Let., 64.

[4] 12 Op., 21.

[5] Messages and Documents, 1866–'67, Abridgement, 703.

enemies of Spain, but with most disastrous consequences for those whom Spain professes to regard as friends." It appears, however, that Admiral Denman had been instructed "not to transgress the limits permissible to the representative of a neutral power, or to associate himself with any proceedings of the United States commodore which might be inconsistent with the neutral character."[1]

The opinion of publicists is expressed by Hall, who declares that "the act gave rise to universal indignation at the time, and has never been defended."[2]

The bombardment practically ended hostilities in Chile; but, to the great inconvenience of neutral powers and particularly of the United States, it effectually blocked the way to the conclusion of a peace.[3] At length, after repeated efforts at mediation, a conference between representatives of Spain and the allies was opened at Washingington Oct. 29, 1870, under the presidency of Mr. Fish, April 11, 1871, an armistice was concluded whereby the *de facto* suspension of hostilities was converted into an indefinite truce, which was not to be broken by any of the belligerents except on three years' notice, given through the Government of the United States; and so long as the truce lasted all restrictions on neutral commerce were to cease. The last session of the conference took place January 24, 1872. Mr. Fish renewed his entreaties for a permanent peace. The Spanish minister declared this to be the desire of his Government. The Chilean minister, with the support of the ministers of Peru and Ecuador, replied that peace would be made if Spain would "remove the obstacle" by making reparation for the bombardment of Valparaiso. The Spanish minister declined to enter into a discussion which could produce "no beneficial result." At this announcement Mr. Fish expressed his disappointment, declaring that the United States had hoped that, in view of the great changes which had taken place in the executive Government of Spain, "the present sovereign * * *

[1] Br. and For. State Papers, LVI, 942, 953–954, 987.

[2] Int. Law, 4th ed., 556. See Calvo, Droit Int., 5th ed., VI, § 428.

[3] Military necessity "does not permit * * * the doing of any hostile act that would make the return of peace unnecessarily difficult." (Stockton, Naval War Code, art. 3.)

might not be held morally accountable for the severe act of his predecessor in the assault on Valparaiso, but might satisfy the natural sensitiveness of Chile by expressing regret that the Government of Isabel II had omitted to offer Chile satisfactory explanations on that subject."

Nearly twenty years elapsed before treaties were made by Spain with Peru and Bolivia, the first of the allies with which she was able to conclude a formal peace.[1]

British-French discussions.—A discussion of the subject of coast warfare was started in 1882 by Admiral Aube, of the French navy, who, in an article against the proposed discontinuance of Rochefort as a military port, argued that as "wealth is the sinews of war, all that strikes at the wealth of the enemy, *a fortiori* all that strikes at the sources of his wealth, becomes not only legitimate but imposes itself as obligatory. It must therefore be expected to see the fleets, mistresses of the sea, turn their power of attack and destruction, instead of letting the enemy escape from their blows, against all the cities of the coast, fortified or not, peaceful or warlike, to burn them, to ruin them, and at least ransom them without mercy. This was the former practice; it ceased; it will prevail again."[2] Similar views were expressed by other French writers.[3] Contrary opinions were maintained by Admiral Bourgois, who deprecated any suggestion of repudiating "the principles of the law of nations which protect inoffensive citizens, noncombatants, and open and undefended towns against the horrors of war."[4]

The effect of these discussions was reflected in the British naval manœuvres of July and August, 1888, in which the enemy's fleet shelled "fine marine residences and watering places" and levied ransoms on undefended towns.[5] These

[1] Moore, Int. Arbitrations, V, 5048–5056.

[2] Revue des Deux Mondes, L, 314, March 15, 1882.

[3] M. Etienne Lamy, Revue des Deux Mondes, LIII, 320, Sept. 15, 1882; M. Gabriel Charmes, "La Reforme Maritime," Revue des Deux Mondes, LXVI, LXVIII, Dec. 15, 1884, March 1, 1885, April 15, 1885.

[4] "Les Torpilles et Le Droit des Gens," La Nouvelle Revue, April 1, 1886; "La Defense des Côtes et Les Torpilles," Dec. 1, 1887, and Feb. 1, 1888. In the same publication, June 1, 1886, there is a reply to Admiral Bourgois' first article by "Un ancien officier de marine."

[5] The Times, Aug. 7, 1888.

proceedings were objected to by Mr. Holland, on the ground that they might be cited as giving an implied sanction to such a mode of hostilities.[1] They were also condemned by Hall, who declared that "the plea * * * that every means is legitimate which drives an enemy to submission * * * would cover every barbarity that disgraced the wars of the seventeenth century;" that the proposal to revive in maritime hostilities a practice which had been "abandoned as brutal in hostilities on land" was "nothing short of astounding;" but that, before such things were done, "states are likely to reflect that reprisals may be made, and that reprisals need not be confined to acts identical with those which have called them forth."[2]

Chilean Revolution, 1891.—January 16, 1891, during the contest between the government of Balmacedo and the Congressionalists, two forts at Valparaiso fired on the Congressionalist man-of-war *Blanco Encalada*, killing and wounding a number of persons on board. The attack "was not returned for reasons of humanity towards the people and the town."[3]

February 16, 1891, a report having reached Iquique that the government troops had been defeated on the pampas near that place, the intendente surrendered the town to the Congressionalists, who occupied it with their naval forces. Early in the morning of February 19, government troops about 250 strong surprised the city, and the marines retired into the custom house, where they were supported by the squadron. Firing continued all day, and two fires broke out. Late in the afternoon a British naval officer, at the request of the revolutionary leaders on the *Blanco Encalada*, went ashore under a flag of truce, and arranged a suspension of arms to enable foreigners and non-combatants to leave the town. But for this, said the British admiral, Hotham, "Iquique would have disappeared, and with 250 drunken Chilean soldiers, no discipline nor police, and supplemented by roughs, the sufferings, and worse,

[1] Studies in Int. Law, 96 et seq.

[2] Int. Law, 4th ed., 556.

[3] Blue-book, Chile, No. 1 (1892), 24. This abstention on the part of the Congressionalists is said to have been due to the influence of Captain St. Clair, of H. M. S. Champion. (Id. 83.)

of non-combatants, especially women and children, may be imagined."[1]

March 26, 1891, Mr. Tracy, Secretary of Navy, addressed to Rear-Admiral Brown instructions in relation to the protection of American interests in Chile during the revolution then going on. With reference to the fleet of the Congressionalist party, whose belligerency had not been recognized by the United States, Mr. Tracy said:

"Should the bombardment of any place, by which the lives or property of Americans may be endangered, be attempted or threatened by such ships, you will, if and when your force is sufficient for the purpose, require them to refrain from bombarding the place until sufficient time has been allowed for placing American life and property in safety. You will enforce this demand if it is refused, and if it is granted, proceed to give effect to the the measures necessary for the security of such life or property."[2]

July 27, 1891, Mr. Kennedy, British minister at Santiago, inclosed to Lord Salisbury a correspondence relating to the then recent bombardment of the town of Pisagua without provocation or notice of any kind by the Chilean Government ships *Almirante Cómdel* and *Imperial*, on June 8, 1891. Among the inclosures there was a protest of the consular body at Pisagua, which stated that the vessels came close into the port about 2 o'clock in the afternoon, and without notice of any kind began to fire their guns into the town, causing much damage. On July 7th Mr. Kennedy addressed a protest to the Chilean Government characterizing the proceeding as being "opposed to the recognized principles of international law or of civil warfare." He also reserved all rights of British subjects as to property destroyed.

August 25, 1891, Mr. Kennedy's protest was approved by Lord Salisbury.[3]

Rules of the Institute of International Law, 1896.—The question of the bombardment of open towns by naval forces

[1] Blue-book, Chile, No. 1 (1892), 82–83.

[2] H. Ex. Doc. 91, 52 Cong. 1 sess., 245.

[3] Blue Book, Chile No. 1 (1892), 198, 218. See Calvo, Droit Int., 5th ed., VI, § 428 et seq.

was considered by the Institute of International Law at Cambridge in 1895, and at Venice in 1896. At the latter session rules were adopted which were designed to supplement, in regard to this question, the Manual of the Laws of War previously resolved upon at the session at Oxford. The rules, which were adopted September 29, 1896, were as follows:[1]

"ART. 1. There is no difference between the rules of the law of war as to bombardment by military forces on land and that by naval forces.

"ART. 2. Consequently there apply to the latter the general principles enunciated in art. 32 of the Manual of the Institute—i. e., it is forbidden (*a*) to destroy public or private property, if such destruction is not commanded by the imperious necessity of war; (*b*) to attack and bombard localities which are not defended.

"ART. 3. The rules enunciated in arts. 33 and 34[2] of the Manual are equally applicable to naval bombardments.

"ART. 4. In virtue of the foregoing principles, the bombardment by a naval force of an open town—i. e., one not defended by fortifications or other means of attack or of resistance for immediate defense, or by detached forts situated in proximity to it, for example, at the maximum distance of from 4 to 10 kil., is inadmissible, except in the following cases:

"(1) In order to obtain by means of requisitions or of contributions what is necessary for the fleet.

"Nevertheless, such requisitions and contributions must remain within the bounds prescribed by arts. 56 and 58[3] of the Manual of the Institute.

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[1] Annuaire, XV, 213.

[2] 33. In case of bombardment all needful measures shall be taken to spare, if it be possible to do so, buildings devoted to religion and charity, to the arts and sciences, hospitals, and depots of sick and wounded. This on condition, however, that such places be not made use of, directly or indirectly, for purposes of defence.

34. It is the duty of the besieged to designate such buildings by suitable marks or signs, indicated, in advance, to the besieger.

[3] 56. Impositions in kind (requisitions), levied upon communes, or the residents of invaded districts, should bear direct relation to the generally recognized necessities of war, and should be in proportion to the resources of the district. Requisitions can only be made, or

"(2) In order to destroy dockyards, military establishments, depots of munitions of war, or vessels of war found in a port.

"Moreover, an open town which is defended against the entrance of troops or of disembarked marines may be bombarded in order to protect the landing of soldiers and of marines if the open town attempts to prevent it, and as an auxiliary measure of war in order to facilitate an assault made by the troops and disembarked marines, if the town defends itself.

"There are specially forbidden bombardments whose sole object is to exact a ransom (*Brandschatz*), and, with greater reason, those destined only to induce the submission of the country by the destruction, without other motive, of peaceable inhabitants or their property.

"ART. 5. An open town may not be exposed to bombardment by the sole fact:

"(1) That it is the capital of a State or the seat of Govment (but, naturally, these circumstances give it no guarantee against bombardment).

"(2) That it is actually occupied by troops, or that it is ordinarily garrisoned by troops of various arms, destined to rejoin the army in time of war."

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levied, with the authority of the commanding officer of the occupied district.

58. The invader can not levy extraordinary contributions of money, save as an equivalent for fines, or imports not paid, or for payments not made in kind. Contributions in money can only be imposed by the order, and upon the responsibility, of the general in chief, or that of the superior civil authority established in the occupied territory; and then, as nearly as possible, in accordance with the rule of apportionment and assessment of existing imposts.

SITUATION II.

Sulphur, which is obtained chiefly from Sicily, is used in the manufacture of powder; it is also used, very largely, in the manufacture of paper from wood pulp and in other mechanical arts. On the understanding that it may, because of the former use, be treated as contraband, the Sicilian merchants, in the case of war between the United States and another power, cease to send it to the United States ports, but ship it by Italian vessels to merchants in Quebec, from whom the American manufacturers of powder as well as of other articles, obtain their supplies, by railway.

Should the vessel in question be seized?

SOLUTION.

"The tendency of all recent authorities * * * goes to show that contraband or not contraband of war is a question of evidence to be determined in each case by reference, not to one particular rule of law, but many; not to any one fact, however strong that may be, but to all the circumstances connected with the goods in question. It is not only, or not so much, whether the goods are * * * capable of being applied to military or naval use, but whether, from all the circumstances connected with them, those very goods are or are not destined for such use."[1]

We must, therefore, consider (1) the nature of the goods; (2) their origin and ownership; (3) their destination.

1. *Nature of the goods.*—According to the usual classification, derived from Grotius, articles of merchandise are divided with reference to the question of contraband as follows:

1. Those manufactured and primarily and ordinarily used for military purposes in time of war.

2. Those that may be and are used for purposes of war or of peace, according to circumstances.

[1] Moseley on Contraband of War, 9.

3. Those exclusively used for peaceful purposes.

"Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent, while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or seige."[1]

With respect to sulphur and saltpetre, "there is much difficulty in deciding whether they come within the definition of ammunition, so as to render them liable, in the first degree, as to all the consequences of such. * * * As things clearly of a doubtful or double use, however much they may be required for and specially adapted for war, it is, no doubt, better to consider them as of the second class of contraband where no treaty exists, and to render them liable to confiscation, to require some other proof, which for such goods need not be very strong, of a warlike destination."[2]

In this relation is to be observed that the importance of sulphur, as an element entering into explosives, has lately declined, while its use in the arts has become more extensive.

In the Instructions to Blockading Vessels and Cruisers, issued by the Navy Department during the war with Spain, certain articles are classed as "absolutely contraband" and certain others as "conditionally contraband." Among the former is included saltpetre, but sulphur is omitted from both lists, and apparently intentionally so. Nor is it included among contraband articles, either absolute or conditional, in the present Naval War Code.

In the royal decree of Spain, of April 23, 1898, sulphur was included in the list of contraband; but it appears that the Spanish Government, upon the request of the Italian Government, afterwards announced its suspension from that category.

2. *Origin and ownership.*—Special consideration has been shown in times past to the natural produce of a neutral country, shipped by and belonging to its nationals.

[1] Chase, C. J., in the case of The *Peterhoff*, 5 Wallace, 28, 58.

[2] Moseley, 47, 48.

This consideration is founded on the principle "that the people of such a country are not needlessly to be deprived of a fair and usual market for their produce;" and "so strong is the rule that, even though it [the produce] be of the nature of contraband in the first degree, in some few specified instances it will be protected." And still more strongly will favorable consideration be justified in respect of articles of a "less degree of contraband."[1]

3. *Destination.*—In various cases that arose during the civil war, it was held by the courts of the United States that goods, although they might be proceeding to a neutral port, were liable to seizure and confiscation as contraband, or for breach of blockade, as the case might be, if they were, at the time of capture, in reality intended, not to be delivered and sold in the neutral market, but to be continuously carried on from their *colorable* destination, by the same or another vessel, or by means of inland transit, to the enemy. These decisions were acquiesced in by the British Government as being in harmony with the precedents in its prize courts. On the other hand, the American courts repeatedly declared that the goods, if *bona fide* intended for sale in the neutral market, were not subject to capture.[2]

Of the belligerent destination, where a "continuous voyage" is alleged, there should be some definite evidence. It has been said that the evidence must be "full and clear;" but, in determining what evidence may satisfy this requirement, it may be proper to bear in mind the doctrine laid down by the same writer, that "in the administration of all law, international as well as municipal, realities and not shams are to be regarded."[3] But, "there seems to be but little question that the evidence as to the destination of the cargo should be definite. A mere presumption should not be sufficient."[4]

Conclusion.—Since sulphur may be considered as only conditionally contraband, and since it is, in the case stated, the natural produce of the country from which it is shipped, and is consigned to merchants in a neutral port, the pre-

[1] Moseley, 11–15.

[2] See the Introduction to Lushington's Manual of Naval Prize Law.

[3] Creasy, First Platform of International Law, 624, 625.

[4] Snow, Int. Law, 157.

sumption is in favor of the innocent character of the cargo. But if there is reasonable ground to believe that it is not to be sold in the neutral market, but that it has been purchased on American account and is to be reshipped to the United States and there used for warlike purposes, the vessel should be seized. The evidence on these points, whether such evidence be found in statements or in defects in the papers, or in the testimony of persons on board, should be substantial, though not necessarily conclusive, to justify the capture.

Due regard must of course be paid to any existing treaty stipulations.

NOTES ON SITUATION II.

I. *Spain's action as to sulphur.*—April 29, 1898, the Italian ambassador at Madrid was orally advised that instructions had been issued to Spanish naval officers temporarily to suspend, in regard to sulphur, the application of the royal decree of April 23, concerning contraband of war. This resolution was confirmed by a note of May 31, 1898, the Spanish Government reserving the right to restore sulphur to the contraband list, should its interests require it, but promising not to do so without sufficient notice, so that pending contracts might be performed. The Italian ambassador replied June 3, 1898, accepting the notification of Spain's resolution, but expressly reserving the question of principle. It was understood to be the opinion of the Italian Government that sulphur could not properly be considered as contraband of war, since it was used in many innocent arts and had ceased to be an ingredient of the higher class of gunpowders.[1]

June 8, 1898, there appeared in the official Imperial Gazette, at Berlin, an announcement that the Spanish ambassador had informed the German Government that sulphur, which had been included in the royal decree of April 23 as contraband of war, was no longer to be so considered.[2]

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[1] Mr. Draper, United States ambassador at Rome, to Mr. Day, Secretary of State, June 9, 1898; Mr. Iddings United States chargé d'affairs *ad int.* at Rome, to Mr. Day, July 16, 1898. (MSS. Department of State.)

[2] Mr. White, United States ambassador, to Mr. Day, June 11, 1898. (MSS. Department of State.)

II. *Decisions of the United States courts, during the civil war, as to the question of "continuous voyages."*—Early in the war the Confederate Government, whose ports were blockaded by the United States, sent abroad agents for the purpose, among others, of obtaining arms and munitions of war and other needful supplies, as well as vessels to transport them, the means of payment to be derived chiefly from the proceeds of the Southern cotton crop. To carry out this plan a firm under the name of Frazer, Trenholm & Co., composed of merchants of Charleston, South Carolina, and constituting a branch of a house in that city, was established in Liverpool. Consignments of cotton were made to this firm, to be drawn against for purchases for the Confederacy.[1] In this way a vast system of blockade running was soon built up, under cover of the neutral flag, but under actual Confederate supervision and control. Commander Bulloch, C. S. N., writing at Liverpool, May 3, 1862, to Mr. Mason, Confederate commissioner in London, stated that he had read to Messrs. Frazer, Trenholm & Co. a part of one of Mr. Mason's letters, and added: "These gentlemen say that their ships are necessarily sailed under the British flag, and the presence on board of any persons known to have been in the Confederate service would compromise their character, and in this view of the case they feel reluctantly compelled to decline giving a passage to any of the *Sumter's* men."[2]

As the system of blockade running grew in notoriety it became more difficult of execution, and Confederate agents were established in the various West India islands to facilitate its operations; and, instead of direct voyages to blockaded ports, goods were shipped in British bottoms to neutral ports and there transshipped into steamers of light draft and great speed, which could carry coal enough for the short passage to Charleston, Savannah, or Wilmington. Of the neutral ports thus used, Nassau, in the island of New Providence, acquired the greatest celebrity.[3]

July 5, 1862, Mr. A. H. Layard, by direction of Earl Russell, addressed a letter to certain British merchants

[1] Moore, Int. Arbitrations, I, 580.

[2] Official Records of the Union and Confederate Navies, Ser. I, vol. 1, p. 770.

[3] Int. Arbitrations, I. 581.

and shipowners of Liverpool in reply to a memorial in which they invoked the protection of the British Government against "the hostile attitude assumed by Federal cruisers in the Bahama waters," so as to put a check on the seizures frequently made therein. Earl Russell, in his reply, stated that complaint had, on the other hand, been made on the part of the United States that ships had been sent out from Great Britain to America "with a fixed purpose to run the blockade; that high premiums of insurance have been paid with this view, and that arms and ammunition have been thus conveyed to the Southern States to enable them to carry on the war. Lord Russell," so the letter continues, "was unable either to deny the truth of those allegations or to prosecute to conviction the parties engaged in those transactions. But he can not be suprised that the cruisers of the United States should watch with vigilance a port which is said to be the great entrêpot of this commerce.

"Her Majesty's Government have no reason to doubt the equity and adherence to legal requirements of the United States prize courts. But he is aware that many vessels are subject to harsh treatment, and that, if captured, the loss to the merchant is far from being compensated even by a favorable decision in a prize court.

"The true remedy would be that the merchants and shipowners of Liverpool should refrain from this species of trade. It exposes innocent commerce to vexatious detention and search by American cruisers; it produces irritation and ill will on the part of the population of the Northern States of America; it is contrary to the spirit of Her Majesty's proclamation, and it exposes the British name to suspicions of bad faith, to which neither Her Majesty's Government nor the great body of the nation are justly obnoxious.

"It is true, indeed, that supplies of arms and ammunition have been sent to the Federals equally in contravention of that neutrality which Her Majesty has proclaimed. It is true, also, that the Federals obtain more freely and more easily that of which they stand in need. But if the Confederates had the command of the sea they would no doubt watch as vigilantly and capture as readily British vessels going to New York as the Federals now watch

Charleston and capture vessels seeking to break the blockade.

"There can be no doubt that the watchfulness exercised by Federal cruisers to prevent supplies reaching the Confederates by sea will occasionally lead to vexatious visits of merchant ships not engaged in any pursuit to which the Federals can properly object. This, however, is an evil to which war on the ocean is liable to expose neutral commerce, and Her Majesty's Government have done all they can fairly do—that is to say, they have urged the Federal Government to enjoin upon their naval officers greater caution in the exercise of their belligerent rights.

"Her Majesty's Government having represented to the United States Government every case in which they were justified in interfering, have only further to observe that it is the duty of Her Majesty's subjects to conform to Her Majesty's proclamation, and to abstain from furnishing to either of the belligerent parties any of the means of war which are prohibited to be furnished by that proclamation."[1]

Early in August, 1862, Mr. Stuart, British chargé d' affaires *ad interim*, represented to Mr. Seward, on the strength of information received from British naval officers, that a British steamer had been chased and fired on by a United States cruiser without display of her colors, and had then been captured without any search, and that the senior United States naval officer present had declared that the American cruisers had orders to seize any British vessels whose names had been forwarded to them from the Government at Washington. Mr. Stuart protested against these instructions as being "entirely at variance with the recognized principles of international law." On the 9th of August Mr. Seward communicated to Mr. Stuart a copy of a letter which he had addressed on the preceding day to Mr. Welles, Secretary of the Navy, conveying the direction of the President that certain instructions, which were set forth in the letter, should be issued to naval officers.[2] Instructions were issued by Mr. Welles August 18, 1862. They embodied the substance of Mr. Seward's draft with certain amendments. They contained the following clauses:

[1] Dip. Cor., 1862, 171.

[2] Blue Book, North America, No. 5 (1863).

"First. That you will exercise constant vigilance to prevent supplies of arms, munitions, and contraband of war from being conveyed to the insurgents, but that under no circumstances will you seize any vessel within the waters of a friendly nation.

"Secondly. That, while diligently exercising the right of visitation on all suspected vessels, you are in no case authorized to chase and fire at a foreign vessel without showing your colors and giving her the customary preliminary notice of a desire to speak and visit her.

"Thirdly. That when that visit is made the vessel is not then to be seized without a search carefully made, so far as to render it reasonable to believe that she is engaged in carrying contraband of war for or to the insurgents, and to their ports directly or indirectly by transshipment, or otherwise violating the blockade; and that if, after visitation and search, it shall appear to your satisfaction that she is in good faith and without contraband, actually bound and passing from one friendly or so-called neutral port to another, and not bound or proceeding to or from a port in the possession of the insurgents, then she can not be lawfully seized. * * *

"You are specially informed that the fact that a suspicious vessel has been indicated to you as cruising in any limit which has been prescribed by this Department does not in any way authorize you to depart from the practice of rules of visitation, search, and capture prescribed by the law of nations."[1]

Diligent watch was kept by the United States consuls in English ports for vessels believed to be engaged in contraband and blockade-running ventures. December 30, 1862, Mr. Adams, United States minister at London, communicated to Earl Russell two lists, respectively furnished by the consuls at Liverpool and London, of vessels which, as Mr. Adams said, were believed to have "left with supplies, principally contraband of war, with the intention of either running the blockade directly or of going to a neighboring Atlantic or Gulf port and there discharging their cargoes into another class of vessels, the more easily to get such cargoes to their places of destination." In these lists, which contained the names of 82 vessels, were the steamers *Bermuda*, *Circassian*, *Gertrude*, *Labuan*, *Pearl*, and

[1] Official Records of the Union and Confederate Navies, Ser. I, vol. 1, p. 417.

Peterhoff, and the sailing vessels *Springbok* and *Stephen Hart*.[1]

Case of the Dolphin.—The first judicial application during the civil war of the doctrine of continuous voyages was made by Judge Marvin, of the district court of the United States for the southern district of Florida, in the case of the *Dolphin*, a steamer of 129 tons net, of apparent British ownership. She was captured March 25, 1863, at 5.15 o'clock a. m., by Lieut. Commander Fleming, of the U. S. S. *Wachusett*, between the islands of Culebra and Porto Rico, while ostensibly on a voyage from Liverpool to Nassau.[2] The *Dolphin* left St. Thomas just after midnight on March 25. The *Wachusett* followed her but lost her in the night; descried her again at daylight, and captured her after an hour and a half's chase and the firing of a number of shots. In his first brief report, March 25, Commander Fleming said: "Suspicion being strong against her I seized her." In a further report, of March 28, he said that the report of the boarding officer, "together with an examination I had of her papers, and the strong suspicion attached to her of intending to run the blockade, induced me to capture her and to send her to Key West.[3]

When sent before the prize court, the vessel and cargo were claimed by one Grazebrook, of Liverpool, to whose order the bills of lading consigned the cargo, while the freight bill consigned it to Messrs. Chambers & Raw, of Nassau. It corresponded to the freight list found on board, except as to certain cases containing in all 920 rifles and 2,240 cavalry swords, which were described as "hardware."

Judge Marvin said that if the vessel and cargo were owned as claimed and "there was no intention on the part of the owner that the vessel should proceed with the cargo to a port of the enemy" there would be no justification for the capture or condemnation of either; but that "if, on the other hand, it was the intention of the owner that the vessel should simply touch at Nassau and should proceed thence to Charleston or some other port of the enemy, then the voyage was not a voyage prosecuted by a neutral

[1] Blue Book, North America, No. 3 (1863), 29, 34, 35.

[2] The Dolphin (May, 1863), 7 Fed. Cases, 868.

[3] Official Records of the Union and Confederate Navies, Ser. I, vol. 2, pp. 135, 136. The *Dolphin* was "on the list," and had been under observation for several days. (Id., 131.)

from one neutral port to another, but was a voyage to a port of the enemy, begun and carried on in violation of the belligerent rights of the United States to blockade the enemy's ports and prevent the introduction of munitions of war. . . . The cutting up of a continuous voyage into several parts by the intervention or proposed intervention of several intermediate ports may render it the more difficult for cruisers and prize courts to determine where the ultimate terminus is intended to be, but it can not make a voyage which in its nature is one to become two or more voyages, nor make any of the parts of one entire voyage to become legal which would be illegal if not so divided."

The master and some of the crew swore that Nassau was the terminus of the voyage. Three letters, however, were found on board, all signed by Grazebrook. One of them, addressed to Chambers & Raw, suggested that if the market at Nassau was "overdone from New York and the States," or if the "French charter" for "army stores, rum, etc.," had fallen through, a "fine trade" might be done "between Nassau and Boston and New York," and a "return cargo" of coal might be brought from Prince Edward Island for blockade runners; or perhaps the steamer might be sold, but not for any of "your Federal or Confederate paper," but only for "hard cash." Another letter, addressed to the master, was of similar purport. The third, which evidently was not intended to be shown to visiting cruisers, and the contents of which were unknown to the master, was addressed to Chambers & Raw. It canceled the prior instructions, which were said to have been given "for a certain reason;" declared that the vessel "of course" was "not to be sold to anyone;" stated that "a power of attorney, for certain purposes," would be sent to the firm by the next mail, and expressed the hope that they would "be able to get some more goods on, instead of taking any off, and at good rates."

Commenting upon the evidence, Judge Marvin observed—

1. That Nassau furnished no market for such a cargo as that of the *Dolphin*. "It is," he said, "a small town. The adjacent islands possess but a small population, dependent on it for supplies. Probably not three merchant steamers ever arrived at that port from any part of the

world until after the present blockade was established, except the regular Government mail steamers. Was her cargo to be sold in Nassau, including the 920 rifles and the 2,240 swords? These are questions which it is not unreasonable that a prize court should ask and expect some reasonable explanation of in a case like this."

2. That it appeared that Mr. Grazebrook did not intend that the vessel should be sold at Nassau or that her voyage should end there. "She was," said Judge Marvin, "to go from Nassau somewhere. More goods were to be put on, instead of taking any off. The studied effort to conceal the ulterior destination; the swords and rifles found on board, and denominated 'hardware;' the almost certain impossibility of employing a steamer of this class and size in any trade in this part of the world by which she could earn even her expenses, other than in the trade and business of violating the blockade; all point with unerring certainty to Charleston or Wilmington as the ulterior destination of the vessel and cargo."

Both were accordingly condemned;[1] and no appeal was taken.

Case of the Pearl.—May 6, 1863, Judge Marvin decided the case of the *Pearl*.[2] This vessel, a small steamer of 72.17 tons net, was captured by the U. S. S. *Tioga*, January 20, 1863, about 60 or 70 miles from Nassau, while ostensibly on a voyage from Liverpool to that port. A claim to the vessel was made by the master on behalf of one Wigg, a merchant of Liverpool, and to the cargo, on behalf of H. Adderly & Co., of Nassau.

In deciding the case, Judge Marvin observed that he had already held, in the case of the *Dolphin*, "that a vessel bound on a voyage from Liverpool to Nassau, with an intention of touching only at the latter port, and of proceeding thence to a blockaded port of the enemy, is engaged in an attempt to violate the blockade, which subjects her to capture in the antecedent as well as in the

[1] Judge Marvin in the course of his opinion cited The *Columbia*, 1 C. Rob., 154; The *Neptunus*, 2 C. Rob., 110; The *Imina*, 3 C. Rob., 167; The *Maria*, 5 C. Rob., 365; The *William*, 5 C. Rob., 385; The *Richmond*, 5 C. Rob., 325; The *Thomyris*, Edwards's Adm., 17; The *Odin*, 1 C. Rob., 252.

[2] 19 Fed. Cases, 54

ultimate stage of the voyage—before arriving at Nassau as well as after having left that port. I think the law also is that if an owner sends his vessel to a neutral port, with a settled intention to commence from such a port a series of voyages to a blockaded port, he thereby commences to violate the blockade, and subjects his vessel to capture, notwithstanding he may also intend to unlade the vessel at the neutral port, discharge the crew, and give all other external manifestations of an intention to end the voyage at such port. Where a deliberate purpose exists to violate a blockade, and measures are actually taken to accomplish that object, the law couples the act and the intent together and declares the offense to be complete. The resorting, therefore, to a neutral port for the purpose of the better disguising the intention, or of procuring a pilot for the blockaded port, or of perfecting the arrangements so as to increase the chances of a successful violation of the blockaded port, will not, in the least, extenuate the offense or avoid the penalty. These measures may increase the difficulty of discovering the true intention, but whenever it is discovered it will give to the transaction its true legal character."[1]

The bill of lading stated that the cargo was shipped by Wigg to be delivered to Adderly & Co. No letter of advice, nor any invoice, was found among the papers; and seven members of the crew concurred in the understanding that they were engaged in a blockade-running venture. Nevertheless, as the vessel when captured was really going from one neutral port to another, Judge Marvin stated that he was unwilling to pronounce a condemnation without affording the claimants all the facilities they might desire for rebutting the presumption that they were engaged in an unlawful enterprise. He therefore ordered that the claimant of the vessel "be allowed to produce further evidence, by his own oath and otherwise, touching his interest therein, and the use he intended at the time of capture to make of the vessel after her arrival at Nassau.

[1]Citing The *Columbia*, 1 C. Rob., 154; The *Neptunus*, 2 C. Rob., 110; Yeaton *v.* Fry, 5 Cranch, 335; The *Richmond*, 5 C. Rob., 325; The *Maria*, id., 365; The *William*, id., 385.

the trade or business he intended she should be engaged in, and for what purpose she was going to that port; and that the claimant of the goods have time to procure an affidavit of his right and title thereto, and to produce such other proof of neutral ownership as he may be advised."

No new evidence was taken under this order; but the court, on a further hearing, probably influenced by the fact that the cargo consisted of 10 bales of cloth and ready-made clothing, and contained nothing distinctively pointing to a belligerent destination, decreed restitution of the vessel and cargo, on payment by the claimants of expenses and costs.[1]

The Supreme Court reversed this decree, and condemned both ship and cargo. In pronouncing sentence as to the vessel, the following grounds were mentioned:

The fact that the firm of H. Adderly & Co. had become well known in the court as largely engaged in the business of blockade running; the testimony of the crew as to the Confederate destination of the vessel; the failure to take new evidence on the order for further proof; the absence from Wigg's affidavit, produced on the motion for further proof, of any statement as to the use intended to be made of the vessel after her arrival at Nassau, or as to the purpose for which she was going thither; and the defective and suspicious character of other testimony for the claimant. The court declared itself satisfied that the vessel "was destined, either immediately after touching at that port [Nassau] or as soon as practicable after needed repairs, for one of the ports of the blockaded coast."

As to the cargo, it was observed that the evidence showed ownership in Wigg rather than in any other person, but that no claim was put in by him. The master put in a claim for Adderly & Co., but in his deposition disclaimed all knowledge of ownership, except from the consignment; and the neglect of the firm to put in an affidavit of title or neutral ownership, under the order for further proof, could not, said the court, be construed otherwise than as

[1] The *Pearl*, 5 Wallace, 574.

an admission that they were not entitled to restitution. The cargo was therefore condemned with the ship.[1]

Case of the Stephen Hart.—The doctrine of continuous voyages was next judicially discussed by Judge Betts, of the United States district court for the southern district of New York, in a series of cases of which we may take, as the leading example, that of the *Stephen Hart*, condemned July 30, 1863.[2] On the same day Judge Betts rendered similar sentences in the cases of the *Springbok* and the *Peterhoff*, which will be noticed hereafter, the case of the *Gertrude*, which will also be mentioned in association with them, having been disposed of by a sentence of condemnation previously in the same month.[3]

The *Stephen Hart* was captured January 29, 1862, by the U. S. S. *Supply*, off the southern coast of Florida, about 25 miles from Key West and 82 miles from Point de Yeacos, in Cuba. The vessel was claimed by one Harris, a British subject, and the cargo by the firm of Isaac, Campbell & Co., of London. The cargo consisted of arms, ammunition, and military clothing. The vessel was bound ostensibly to Cardenas, in Cuba. There were found on board, at the time of her capture, her register and sundry bills, certificates, telegrams, and letters, a clearance, two log books, a copy of the United States Coast Survey for 1856, and various other papers, but no invoices, no bills of lading,

[1] The *Pearl* (1866), 5 Wall., 574.

[2] Blatchford's Prize Cases, 387.

[3] The *Gertrude*, an English iron screw steamer, 450 tons, was captured off the island of Eleuthera, April 16, 1863, by the U. S. S. *Vanderbilt*, Baldwin, commanding. In his report to Admiral Wilkes, Commander Baldwin said: "The *Gertrude* has on board an assorted cargo, including 250 barrels of powder, which stamps her as a contraband trader. * * * No log book can be found as yet." She was "caught after a hard chase of 28 miles, during which time a part of her cargo was thrown overboard. She was endeavoring to reach Harbor Island," and showed no colors till three shots had been fired, the last one at her, when she hoisted English colors. She "left Nassau on or about the 8th of April," and had since been off the southern coast, but having failed to run the blockade, and having only 36 hours' coal aboard, was on her way back to Nassau when fallen in with. A person was on board, a citizen of Charleston, who was taken to be a pilot. (Official Records of the Union and Confederate Navies, Ser. 1, vol. 2, p. 159.) No claim was put in for the vessel and no appeal taken from the sentence of condemnation.

and no manifest. The vessel was originally built and owned in the United States, and there was strong evidence to show that she was enemy's property. The shipping articles specified a voyage from London to Cuba and Sierra Leone and any ports on the coast of Africa, of North or South America, or of the West Indies, and back to the United Kingdom. The letter of instructions from the owners of the cargo directed the master to proceed to Cardenas, Cuba, and on arrival there to report to "Charles J. Helm, esq.," who was to direct his "future actions with reference to the schooner and cargo." Charles J. Helm was the agent of the Confederate States in Cuba.

The first mate testified that "the destination of the cargo was certainly to one of the Confederate States, and the vessel was in like manner so destined, if Charles J. Helm, the Confederate agent at Cuba, should so direct." He narrated at length how he had met Mr. Yancey and other well-known agents of the Confederacy at the house of Isaac, Campbell & Co., and how he was at first employed to undertake a blockade-running adventure on the steamer *Gladiator*, and was afterwards transferred to the *Stephen Hart*, nominally as mate but really in charge of the cargo. Before the *Stephen Hart* sailed he was directed by one of the Confederate agents to proceed to Cardenas and there work under the instructions of Charles J. Helm, and he was informed that the cargo was to be transshipped into a steamer which could with greater facility run the blockade, unless, indeed, the *Stephen Hart* should be ordered to proceed herself.

Upon this and much other evidence of similar purport, Judge Betts declared that no doubt was left upon his mind that the case was "one of a manifest attempt to introduce contraband goods into the enemy's territory by a breach of blockade." There was an absence of all papers and circumstances to warrant the conclusion "that there was any intent to dispose of the cargo at Cardenas in the usual way of lawful commerce." The consignee of the entire cargo was the agent of the enemy, and it was laden on board by the enemy's agent in London.

The broad issue upon the merits of the cause was, said Judge Betts, "whether the adventure of the *Stephen Hart*

was the honest voyage of a neutral vessel from one neutral port to another neutral port, carrying neutral goods between those two ports only, or was a simulated voyage, the cargo being contraband of war, and being really destined for the use of the enemy, and to be introduced into the enemy's country by a breach of blockade by the *Stephen Hart*, or by transshipment from her to another vessel at Cardenas." This question, declared Judge Betts, was not to be decided by merely ascertaining whether the vessel was documented for, and sailing upon, a voyage from London to Cardenas. If the inquiry were thus limited "a very wide door would be opened for fraud and evasion." The commerce consisted in the destination and intended use of the property laden on board the vessel, and the proper test to be applied was whether the contraband goods "are intended for sale or consumption in the neutral market, or whether the direct and intended object of their transportation is to supply the enemy with them." If such was the object they were not exempt from forfeiture merely on the ground that they were neutral property, and that the port of delivery was also neutral. In this relation, Judge Betts said:

"If the guilty intention, that the contraband goods should reach a port of the enemy, existed when such goods left their English port, that guilty intention can not be obliterated by the innocent intention of stopping at a neutral port on the way. If there be, in stopping at such port, no intention of transshipping the cargo, and if it is to proceed to the enemy's country in the same vessel in which it came from England, of course there can be no purpose of lawful neutral commerce at the neutral port by the sale or use of the cargo in the market there; and the sole purpose of stopping at the neutral port must merely be to have upon the papers of the vessel an ostensible neutral terminus for the voyage. If, on the other hand, the object of stopping at the neutral port be to transship the cargo to another vessel to be transported to a port of the enemy, while the vessel in which it was brought from England does not proceed to the port of the enemy, there is equally an absence of all lawful neutral commerce at the neutral port; and the only commerce carried on in

the case is that of the transportation of the contraband cargo from the English port to the port of the enemy, as was intended when it left the English port. The court holds that, in all such cases, the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any part of such voyage or transportation be unlawful, it is unlawful throughout; and that the vessel and her cargo are subject to capture, as well before arriving at the first neutral port at which she touches after her departure from England, as on the voyage or transportation by sea from such neutral port to the port of the enemy."[1]

Judge Betts was careful to distinguish between such a voyage as that in which the *Stephen Hart* was engaged and a voyage having an actual neutral terminus. With regard to the latter and to the vessel before the court he said:

"If she was, in fact, a neutral vessel and if her cargo, although contraband of war, was being carried from an English port to Cardenas for the general purpose of trade and commerce at Cardenas, and for use or sale at Cardenas, without any actual destination of the cargo, prior to the time of capture, to the use and aid of the enemy, then most certainly both the vessel and her cargo were free from liability of capture."

The sentence of condemnation pronounced by Judge Betts in this case was affirmed by the Supreme Court. Chief Justice Chase, who delivered the opinion, observed that the principal features of the case resembled that of the *Bermuda* and her cargo, but were perhaps even more irreconcilable with neutral good faith. "It is enough to say," declared Chief Justice Chase, "that neutrals who

[1] In support of these propositions Judge Betts cited the cases of The *Dolphin* and The *Pearl*, supra; Halleck on International Law, chap. 21, sect. 11, p. 504; 1 Kent's Commentaries, eighth edition, p. 85, note *a*; 1 Duer on Insurance, 568; Jecker *v.* Montgomery, 18 Howard, 110, 115; 2 Wildman's International Law, 20; The *Jonge Pieter*, 4 C. Rob., 79; The *Richmond*, 5 C. Rob., 356; The *William*, 5 C. Rob., 385; The *Nancy*, 3 C. Rob., 122; The United States, Stewart's Adm. Rep., 116; The *Imina*, 3 C. Rob., 167; The *Trende Sostre*, 6 C. Rob, 390; The *Columbia*, 1 C. Rob., 154; The *Neptunus*, 2 C. Rob., 110.

place their vessels under belligerent control and engage them in belligerent trade or permit them to be sent with contraband cargoes under cover of false destination to neutral ports, while the real destination is to belligerent ports, impress upon them the character of the belligerent in whose service they are employed, and can not complain if they are seized and condemned as enemy property."[1]

Case of the Bermuda.—The question discussed in the foregoing cases was first dealt with by the Supreme Court in the case of the steamship *Bermuda*,[2] which came up on an appeal from a decree of the United States district court for the eastern district of Pennsylvania condemning the vessel and part of her cargo, which were captured by the U. S. S. *Mercedita*, April 26, 1862, near the British West India island of Abaco.

It was claimed by the captors that the vessel was enemy's property; that it was her intention with her cargo, which was largely composed of munitions of war, to break, either directly or by transshipment, the blockade of the southern coast of the United States, and that both ship and cargo were on these and other grounds liable to capture and condemnation.

The ostensible owner of the ship was one Haigh, a British subject; her original master was one Tessier, a South Carolinian. On the day after her registration, Haigh, as appeared by a document from the Liverpool customs, executed a power of attorney to two persons named Hencle and Trenholm, both of Charleston, South Carolina, to sell the ship at any place out of the Kingdom for any sum they might deem sufficient. Trenholm was a member of the firm of Frazer, Trenholm & Co., of Liverpool, a branch of the house of John Frazer & Co., of Charleston, and the fiscal agents of the Confederacy in Great Britain, in which capacity they were largely engaged in fitting out cruisers and blockade runners.

With the registry and power of attorney above mentioned the *Bermuda* sailed for Charleston, S. C. Subsequently she changed her course and ran the blockade of Savannah, returning to Liverpool in the autumn of the same year. Her master, Tessier, was then transferred to

[1] The *Hart*, 3 Wallace, 559. [2] 3 Wallace, 514; 1865.

the *Bahama*, which afterwards became known for carrying the armament of the Confederate cruiser *Alabama*. In his place, as master of the *Bermuda*, was installed one Westendorff, who was licensed by the British authorities, on the recommendation of Frazer, Trenholm & Co., as an experienced shipmaster, sailing out of Charleston, who had commanded one of their ships. The name of the firm of Frazer, Trenholm & Co., Liverpool, was indorsed on the back of Westendorff's license as his address.

The *Bermuda* was now prepared at West Hartlepool for another voyage, ostensibly to Bermuda. The cargo consisted of various things, including tea, coffee, drugs, surgical instruments, shoes, boots, leather, saddlery, lawns with figures of a youth bearing onward the Confederate flag, military decorations, epaulettes, stars for the shoulder straps of officers of rank, many military articles with designs appropriate for use in the Confederate States, cases of cutlery stamped with the names of merchants in Confederate cities, several cases of double-barrelled guns stamped as manufactured for a dealer in Charleston, a large amount of munitions of war, five finished Blakely cannon in cases, with carriages, six cannon without cases, a thousand shells, several hundred barrels of gunpowder, 72,000 cartridges, 2,500,000 percussion caps, 21 cases of swords, and in addition a large quantity of army blankets and other materials. Numerous letters of friendship and business were found on board the vessel, as well as books and newspapers addressed to different persons in the Confederate States, and also a few memoranda, apparently in the nature of requests from persons in Charleston to Capt. Westendorff to buy things for them in England and bring them through the blockade. There were also on board several persons denominated in various letters as "Government passengers," and in one letter as "printers and engravers," who had been sent from Scotland by an agent of the Confederate Government, and who were entered on the crew list of the *Bermuda* as common sailors. They had with them a large number of boxes containing Confederate postage stamps, copper plates, envelopes, printing ink, and many reams of white bank-note paper watermarked C. S. A. There were also on board certain well-known

gentlemen, residents of Charleston, who were also entered on the shipping list as common sailors, under disguised names. Of the ship's real company, the master, the first mate, the clerk, and three seamen, were citizens of South Carolina, and the second mate, carpenter, and cook belonged to other Confederate States.

There were 45 bills of lading, of which 41 were for goods shipped by Frazer, Trenholm & Co. The whole cargo was shipped under their direction, and according to the bills of lading was to be delivered at the island of Bermuda "unto order or assigns." No consignees were named. Several persons connected with the ship, who were examined *in preparatorio*, thought that she belonged to Frazer, Trenholm & Co. A letter of one of the mates, found on board, seemed to indicate the same thing, as also a letter of the former captain, Tessier, to Westendorff.

Much stress was laid by the captors upon the correspondence found on board. It appeared that on January 16, 1862, Frazer, Trenholm & Co., at Liverpool, wrote to John Frazer & Co., at Charleston, that they had dispatched the ship *Ella* with a cargo to N. T. Butterfield, their agent at Hamilton, Bermuda, and that she would be followed by the steamer *Bermuda* with goods. On January 23 they wrote again, inclosing bills of lading of the cargo of the *Ella* and copies of invoices. The goods, they said, were "all shipped by our friends here; but the disposition of them there is left entirely to you, and in any market in which you may please to direct them. The bills of lading are indorsed to your order, or that of your authorized agent. * * * Captain Carter [of the *Ella*] is instructed to proceed to Bermuda, and there await your instructions," which were to be sent under cover to Butterfield. By a later letter, of February 28, 1862, addressed to "Messrs. Jno. Frazer & Co. (or their authorized agent), Hamilton, Bermuda," Messrs. Frazer, Trenholm & Co., referring to the invoices and bills of lading of the *Bermuda*, said they were "very full in every particular, and we think will greatly facilitate the delivery *and also the transshipment*, should this be determined upon." On April 1, 1862, the Charleston house, having by a previous letter informed Butterfield that they have been advised that the *Ella* had

been dispatched and that she would be followed by the *Bermuda*, wrote another letter requesting him to direct Captain Westendorff to take certain articles from the *Ella* and proceed to Nassau, reporting himself on arrival there to H. Adderly & Co., and to request Captain Carter to "keep in his cargo and wait further orders from us." This letter was received by Butterfield on the 19th of April and was forwarded the same day to Westendorff, at St. George's. Westendorff immediately acted upon it and sailed on the 23d of April toward Nassau. He had arrived at Bermuda on the 19th of March and had remained there about five weeks, during which the cargo was not touched. The gentlemen from Charleston were aboard.

Among the papers taken on board there was also an unfinished letter without signature, but apparently written by the engineer of the *Bermuda* to a friend. This letter was dated at Liverpool, February 16, 1862, and stated that "our tender," a light-draft boat called the *Herald*, had left the day before with a crew shipped for twelve months "for some port or ports south of Mason and Dixon's line;" that "three captains" were on the tender—"one an Englishman, nominal; another, an experienced coast pilot from the Potomac to Charleston; another, ditto, ditto, from Charleston to the San Juan River in Texas. If the Yankees reach her, they are smarter than I give them credit for. She awaits our arrival in Bermuda; goes first into Charleston. * * * ."

The record disclosed that the captain of the *Herald*, after his arrival at Bermuda, drew a bill on Frazer, Trenholm & Co., at Liverpool, in favor of Westendorff, showing that the latter had advanced a certain amount of money to the *Herald*. It was also testified by a person on the *Bermuda* that the *Herald* was connected with the former ship.

At the time of the capture, and after the vessel was boarded, the captain's brother, by his order, threw overboard two small boxes and a package, which he swore he understood contained postage stamps, and a bag which he understood contained letters, and which he was instructed to destroy in case of capture. One of the gentlemen from Charleston also destroyed a number of letters, which he swore were private letters, intrusted to him by Americans in Europe.

On the part of the claimants it was contended—

1. That the vessel was captured within British territorial waters.

2. That both the vessel and the cargo were owned by neutrals, and that their destination was either Bermuda or Nassau, a neutral port.

3. That there was no intent to run the blockade; that the ship, after arriving at Bermuda, was instructed to proceed to Nassau in order that her cargo might be landed and another cargo be taken on board for some port in Europe; that it was the intention of the consignees at Nassau, who were correspondents of Frazer, Trenholm & Co., to carry out these instructions strictly; that a part of the munitions of war were intended for the Government of Hayti, and the rest, "for sale at Bermuda or Nassau, in the usual course of business, to any person willing to purchase the same."

4. That the fact that the ship was not intended to run the blockade was shown by the circumstance that the "government passengers," though they all undoubtedly wished to enter the Confederate States, all disembarked at Bermuda and did not rejoin the vessel when she sailed to Nassau.

5. That there was no concealment as to anything on board; that everything was fairly entered on the bills of lading and manifest; and that the crew were shipped for a term not exceeding twelve months from Liverpool to Bermuda, and thence, if required, to any ports or places in the West Indies, British North America, the United States, and back to the United Kingdom; and that their wages did not exceed that of ordinary voyages in peaceful times.

The opinion of the court was delivered by Chief Justice Chase, and was unanimous.

The court held that all the circumstances, including that of the spoliation of papers, which was one of unusual aggravation, warranted the most unfavorable inference as to ownership, employment, and destination; that all the transactions repelled the conclusion that Haigh was the true owner; that not a document taken on the ship showed ownership in him except the shipping articles, which were

false in putting upon the crew list employees of the Confederate Government and enemy passengers: that there was no indication that, after Haigh gave the power of attorney, he performed a single act of ownership; that no letter alluded to him as owner, and no direction as to vessel or cargo recognized him as such; but that, on the contrary, all the papers and all the circumstances indicated that a sale was made in Charleston under the power, by which the beneficial control and real ownership were transferred to John Frazer & Co., while the apparent title, by the British papers, was suffered to remain in Haigh as a cover. It was therefore held that the ownership of Haigh was a pretense, and that the vessel was rightly condemned as enemy property.

Assuming for the moment, however, that Haigh was the owner of the ship, the court next considered the question as to the employment of the vessel and cargo at the time of the capture. The theory of counsel for Haigh was, said the court, that the ship was neutral and carried a neutral cargo, in good faith, from one neutral port to another; and they insisted that the description[1] of cargo, if neutral, and in a neutral ship, and on a neutral voyage, could not be inquired into in the courts of a belligerent. "We agree to this," said the court. Neutrals might "convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port."

It was asserted by counsel, said the court, that British merchants had "a perfect right to trade, even in military stores, between their own ports, and to sell at one of them goods of all sorts, even to an enemy of the United States, with knowledge of his intent to employ them in rebel war against the American Government. If," continued the court, "by trade between neutral ports is meant real trade, in the course of which goods conveyed from one port to another become incorporated into the mass of goods for sale in the port of destination; and if by sale to the ene-

[1] Possibly the phrase "description of cargo," which appears in the published report, is a misprint. The character of the cargo is what seems to be meant.

mies of the United States is meant sale to either belligerent, without partiality to either, we accept the proposition of counsel as correct. But if it is intended to affirm that a neutral ship may take on a contraband cargo ostensibly for a neutral port, but destined in reality for a belligerent port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it."

Applying these principles to the case under consideration, the court observed that a large part of the cargo was contraband in the narrowest sense of the word, and a part of it expressly destined to the Confederate States, so that the character of the cargo made "its ulterior, if not direct, destination to a rebel port quite certain." There was, besides, evidence of destination found in the letters of Frazer, Trenholm & Co. which made distinct references to the contingency of transshipment; and the evidence showed that the *Herald* was sent over with a view to this. Moreover, the consignment of the whole cargo to order or assigns, which meant in fact to the order of John Frazer & Co., of Charleston, was "conclusive, in the absence of proof to the contrary, that its destination was the port in which the consignee resided and transacted business. * * * It makes no difference," said the court, "whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo. The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene."[1] There seemed to be no reason, said the court, "why this reasonable and settled doctrine should not be applied to each ship

[1] The court cited Jecker *v.* Montgomery, 18 Howard, 114; The *Polly*, 2 C. Rob., 369; The *William*, 5 C. Rob., 395; 1 Kent's Commentaries, 84, note.

where several are engaged successively in one transaction, namely, the conveyance of a contraband cargo to a belligerent. The question of liability must depend on the good or bad faith of the owners of the ships. If a part of the voyage is lawful, and the owners of the ship conveying the cargo in that part are ignorant of the ulterior destination, and do not hire their ship with a view to it, the ship can not be liable; but if the ulterior destination is the known inducement to the partial voyage, and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage must attach to the earlier, undertaken with the same cargo and in continuity of its conveyance. Successive voyages, connected by a common plan and a common object, form a plural unit. They are links of the same chain, each identical in description with every other, and each essential to the continuous whole."

Should the *Bermuda*, on these principles, be condemned for the conveyance of contraband? By the ancient rule, said the court, the vessel which carried contraband was condemned as well as the cargo. Of this rule there had been a great but very proper relaxation to the effect that the neutral might convey contraband to a belligerent, subject to no liability except seizure with a view to the confiscation of the offending goods. This relaxation, however, required good faith on the part of the neutral, and did not protect the ship where good faith was wanting. Thus, the carrying of contraband with a false destination was a ground of condemnation.[1] Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith; but the belligerent is entitled to require of neutrals a frank and *bona fide* conduct.[2] So, too, vessels had been condemned for being engaged actually or practically in enemy service.[3]

What, then, inquired the court, were the marks by which the conveyance of contraband on the *Bermuda* was

[1] The *Franklin*, 3 C. Rob., 224.

[2] The *Neutralitet*, 3 C. Rob., 296; Carrington *v.* Merchants' Insurance Co., 8 Peters, 518; The *Ranger*, 6 C. Rob., 126.

[3] The *Jonge Emilia*, 3 C. Rob., 52; The *Carolina*, 4 C. Rob., 256.

accompanied? First, there was the character of the contraband articles fitted for immediate military use in battle or for the immediate civil service of the enemy government; then, the deceptive bills of lading requiring delivery at Bermuda, when there was either no intention to deliver there at all or none not subject to be changed by the enemies of the United States; then, the appointment of one of these enemies as master, necessarily made with the knowledge and consent of Haigh, if he was the owner; then the complete surrender of the vessel to the use and control of such enemies, without even the pretence of want of knowledge by the alleged owner, of her destined and actual employment. The circumstances rendered it highly probable that the ship at the time of capture was actually in the service of the Confederate Government, and known to be so by all parties interested in her ownership. But, however this might be, it could not be doubted that the *Bermuda* was justly liable to condemnation "for the conveyance of contraband goods destined to a belligerent port, under circumstances of fraud and bad faith, which make the owner, if Haigh was owner, responsible for unneutral participation in the war. The cargo, having all been consigned to enemies, and most of it contraband, must share the fate of the ship."

Having thus disposed of the questions connected with the ownership, control, and employment of the *Bermuda* and the character of her cargo, the court added that little need be said on the subject of liability for the violation of the blockade. "What has been already adduced of the evidence," said the court, "satisfies us completely that the original destination of the *Bermuda* was to a blockaded port, or, if otherwise, to an intermediate port, with intent to send forward the cargo by transshipment into a vessel provided for the completion of the voyage. It may be that the instructions to Westendorff were not settled when the steamship left St. George's for Nassau; but it is quite clear to us that the ship was then at the disposition of John Frazer & Co., and that the voyage, begun at Liverpool with intent to violate the blockade, delayed at St. George's for instructions from that firm, continued toward

Nassau for the purpose of completion from that port to a rebel port, either by the *Bermuda* herself or by transshipment, was one voyage from Liverpool to a blockaded port, and that the liability to condemnation for attempted breach of blockade was, by sailing with such purpose, fastened on the ship as firmly as it would have been by proof of intent that the cargo should be transported by the *Bermuda* herself to a blockaded port, or as near as possible, without encountering the blockading squadron, and then sent in by a steamer, like the *Herald*, of lighter draft or greater speed."

As to the question of capture within neutral waters, the court observed that there was nothing in the evidence which proved to its satisfaction that such was the fact.

It was therefore held that "both vessels and cargo, even if both were neutral, were rightly condemned."

By this judgment the decree of the court below condemning the vessel and the munitions of war was affirmed. Subsequently the district court passed a decree condemning the residue of the cargo.

Case of the Springbok.—Of all the decisions rendered by the Supreme Court in cases involving the question of continuous voyage, that which was pronounced in the case of the British bark *Springbok* has been most discussed and most criticised.[1] The case came up on appeal from a decree of the United States district court for the southern district of New York, condemning the bark and her cargo,[2] which had been captured at sea by the United States gunboat *Sonoma*.[3]

It appeared the vessel was owned by British subjects and was commanded by the son of one of the owners. She

[1] The Springbok (1866), 5 Wallace, 1.

[2] Blatchford's Prize Cases, 349; May, 1863.

[3] Commander T. H. Stevens, U. S. S. *Sonoma*, in a report to Admiral Wilkes, Feb. 9, 1863, said: "On the morning of the 3d of February, while looking for the *Oreto*, I captured the English bark *Springbok*, loaded with contraband, bound to Nassau, but having nothing in the way of a manifest of a legal character, and being upon the list furnished by you. I sent her to New York for adjudication in charge of Acting Master Foster Willis, with a prize crew from this vessel. The vessel was from London. The capture was made in latitude 25° 41′ N., long. 74° 46′ W." (Official Records of the Union and Confederate Navies, Ser. I, vol. 2, p. 70.)

was chartered November 12, 1862, to T. S. Begbie, of London, to take a cargo of merchandise and therewith "proceed to Nassau, or so near thereunto as she may safely get, and deliver same," and thirty days were allowed "for loading at port of loading and discharging at Nassau." This document was indorsed by Speyer & Haywood, who, on December 8, 1862, instructed the master: "You will proceed at once to the port of Nassau, N. P., and on arrival report yourself to Mr. B. W. Hart there, who will give you orders as to the delivery of your cargo." In a letter directed to Hart, Speyer & Haywood spoke of themselves as acting "under instructions from Messrs. Isaac, Campbell & Co." By the bills of lading the cargo was to be delivered to order or assigns.

The ship set sail from London December 8, 1862, and was captured February 3, 1863, about 150 miles east of Nassau, when making for that port. When captured, she made no resistance and her papers were given up without any attempt at concealment or spoliation.

On the hearing before the district court, counsel for the captors invoked the proofs taken in two other cases then on trial, namely, United States *v.* The Steamer Gertrude,[1] and United States *v.* The Schooner Stephen Hart.[2] As has been seen, the *Stephen Hart* was captured January 29, 1862, and the claimants of her cargo were Isaac, Campbell & Co., who claimed jointly with Begbie the cargo of the *Springbok*. The brokers who had charge of the lading of the *Stephen Hart* were also Speyer & Haywood. The *Gertrude* was captured April 16, 1863, off one of the Bahama islands while on a voyage ostensibly from Nassau to St. John's, N. B. She was condemned, and no claim was put in either to the vessel or her cargo. The testimony showed that she belonged to Begbie; that her cargo consisted, among other things, of hops, dry goods, drugs, leather, cotton cards, paper, 3,960 pair of gray army blankets, 335 pair of white blankets, linen, woolen shirts, flannel, 750 pair of army brogans, Congress gaiters, and 24,900 pounds of powder; that she was captured after a

[1] Blatchford's Prize Cases, 374; July, 1863.
[2] Id. 387; July, 1863, supra.

chase of three hours, and when making for the harbor of Charleston, her master knowing of its blockade, and having on board a Charleston pilot under an assumed name.

The opinion of the Supreme Court in the case of the *Springbok* was delivered by Chief Justice Chase. He admitted that the invocation of the documents in the cases of the *Gertrude* and the *Stephen Hart*, at the original hearing, was not "strictly regular;" but he also held that the irregularity was not such as would justify a reversal of the decree of the court below, or a refusal to examine the documents invoked and forming part of the record.

It had already been held, said the court, in the case of the *Bermuda* that where goods destined ultimately for a belligerent port were "being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods," the ship, though liable to seizure in order that the goods might be confiscated, was not liable to condemnation as prize. The *Springbok* was thought fairly to come within this rule. Her papers were regular and genuine and showed a neutral destination of the ship. Her owners were neutral and did not appear to have any interest in the cargo, nor was there any proof that they knew of its alleged unlawful destination. It was therefore adjudged that the ship should be restored; but in view of a misrepresentation made by the master when examined and of the circumstance that he signed bills of lading which did not truly and fully state the nature of the goods contained in certain bales and cases, no costs or damages were allowed to the claimant.

The case of the cargo was, said the court, quite different. In addition to the facts heretofore noted as to the lading and consignment of the cargo, the court stated that the bills of lading, while they disclosed the contents of 619 packages, "concealed" the contents of 1,388. On this point the court laid great stress, especially in view of the fact that the owners of the cargo knew that it was going "to a port in the trade with which the utmost candor of statement might be reasonably required." The true reason of the concealment must be found in the desire of the owners to hide from the scrutiny of the Amer-

ican cruisers the contraband character of a considerable part of the contents of the packages. Moreover, the bills of lading and the manifest "concealed" the names of the owners. The true motive of this concealment must have been, said the court, the apprehension of the claimants that the disclosure of their names as owners would lead to the seizure of the ship in order that the cargo might be condemned. It was admitted, however, that "these concealments" did not of themselves warrant condemnation, and the court then proceeded "to ascertain the real destination of the cargo." "If," said the court, "the real intention of the owners was that the cargo should be landed at Nassau and incorporated by real sale into the common stock of the island, it must be restored, notwithstanding this misconduct. What, then, was this real intention?"

That some other destination than Nassau was intended was inferred, first, from the fact that by the bills of lading and the manifest the cargo was consigned to order or assigns. This was treated as a "negation" that a sale was intended to anyone at Nassau, since, if such a sale had been intended, the goods would most likely have been consigned for that purpose to some established house named in the bills of lading. This inference was strengthened by the fact that the agent of the owners at Nassau was to receive the property and execute the instructions of his principals.

These instructions were not in evidence; but they might, said the court, be collected in part from the character of the cargo. A part of it, small in comparison with the whole, consisted of arms and munitions of war. A somewhat larger part consisted of articles useful and necessary in war. These portions being contraband, the residue belonging to the same owners must share their fate. "But," declared the court, "we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it could not be condemned, if really destined for Nassau and not beyond; and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade.

"Looking at the cargo with this view we find that a part of it was specially fitted for use in the rebel military service and a larger part, though not so specially fitted, was yet well adapted to such use. Under the first head we include the sixteen dozen swords, and the ten dozen rifle bayonets, and the forty-five thousand navy buttons, and the one hundred and fifty thousand army buttons; and under the latter the seven bales of army cloth and the twenty bales of army blankets and other similar goods. We can not look at such a cargo as this and doubt that a considerable portion of it was going to the rebel States, where alone it could be used; nor can we doubt that the whole cargo had one destination.

"Now if this cargo was not to be carried to its ultimate destination by the *Springbok* (and the proof does not warrant us in saying that it was), the plan must have been to send it forward by transshipment. And we think it evident that such was the purpose. We have already referred to the bills of lading, the manifest, and the letter of Speyer & Haywood as indicating this intention, and the same inference must be drawn from the disclosures by the invocation that Isaac, Campbell & Co. had before supplied military goods to the rebel authorities by indirect shipments and that Begbie was the owner of the *Gertrude* and engaged in the business of running the blockade.

"If these circumstances were insufficient grounds for a satisfactory conclusion, another might be found in the presence of the *Gertrude* in the harbor of Nassau with undenied intent to run the blockade about the time when the arrival of the *Springbok* was expected there. It seems to us extremely probable that she had been sent to Nassau to await the arrival of the *Springbok* and to convey her cargo to a belligerent and blockaded port, and that she did not so convey it only because the voyage was intercepted by the capture.

"All these condemnatory circumstances must be taken in connection with the fraudulent concealment attempted in the bills of lading and the manifest and with the very remarkable fact that not only has no application been made by the claimants for leave to take further proof in order to furnish some explanation of these circumstances, but

that no claim, sworn to personally, by either of the claimants, has ever been filed.

"Upon the whole case we can not doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the *Springbok;* that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing."

In conformity with this opinion the decree of condemnation of the district court was reversed as to the ship, but without costs or damages to the claimants, and was affirmed as to the cargo.

Matamoras cases—the Peterhoff.—The Mexican town of Matamoras, situated on the Rio Grande, nearly opposite Brownsville, in Texas, which formed one of the Confederate States, offered obvious advantages as a base of contraband trade.

The steamer *Peterhoff* was captured Feb. 25, 1863, near the island of St. Thomas, D. W. I., by the U. S. S. *Vanderbilt*, and was condemned by the United States district court for the southern district of New York, together with her cargo, for attempt to break the blockade. From this sentence an appeal was taken to the Supreme Court.[1]

The *Peterhoff* was fully documented as a British merchant steamer upon a voyage, as shown by her manifest, shipping list, clearances, and other papers, from London, England, to Matamoras, in Mexico. The bills of lading all stipulated for the delivery of the goods "off the Rio Grande, Gulf of Mexico, for Matamoras," adding that they were to be taken from alongside the ship, provided that lighters could cross the bar at the mouth of the river. The cargo was miscellaneous, and shipped by different persons, all but one of whom were British subjects, and a part of it belonged to the owner of the vessel. Of the numerous packages a certain number contained articles

[1] The Peterhoff (1866), 5 Wallace, 28.

useful for military purposes during war. Among them were 36 cases of artillery harness, 14,450 pair of "Blucher" boots, 5,580 pair of "government regulation grey blankets," 95 casks of horseshoes of large size, suitable for cavalry service, and 52,000 horseshoe nails. There were also considerable amounts of iron, steel, shovels, spades, blacksmiths' bellows and anvils, nails, and leather, and an assorted lot of drugs—1,000 pounds of calomel, large quantities of morphine, 265 pounds of chloroform, and 2,640 ounces of quinine. Owing to the blockade of the coast, drugs, and especially quinine, were greatly needed in the Southern States.

With the exception of a portion consigned to the order of the master, which belonged to the owners of the vessel, the cargo was represented in agency or consigneeship chiefly by three different persons on board the vessel as passengers—Redgate, Bowden, and Almond—all natives of Great Britain, and at the time of the capture all British subjects, except Redgate, who had become a citizen of the United States, and who, before the outbreak of the war, resided in Texas. He stated that at the time of the capture he intended to establish a mercantile house at Matamoras, and that, had his "goods arrived there, they were to take the chances of the market." Bowden and Almond testified to substantially the same effect as to their respective ventures. During the war Matamoras, which lies on the Mexican side of the Rio Grande, nearly opposite the town of Brownsville, in Texas, had, by reason of the facilities which as a neutral port it offered for trade with the Confederacy, whose seaports were all blockaded, suddenly risen from the position of a place of no importance "into a great centre of commercial activity, rivalling the trade of New York or Liverpool."

The opinion of the Supreme Court in the case of the *Peterhoff* was delivered by Chief Justice Chase. He stated that the record satisfied the court that the voyage of the ship "was not simulated." She was "in the proper course of a voyage from London to Matamoras;" nor was there any evidence which fairly warranted the belief "that the cargo had any other direct destination." The proposed delivery of the cargo off the mouth of the Rio

Grande into lighters for Matamoras was "in the usual course of trade," since it was impossible for a vessel of heavy draught to enter the river. "It is true," said the court, "that by these lighters some of the cargo might be conveyed directly to the blockaded coast; but there is no evidence which warrants us in saying that such conveyance was intended by the master or the shippers. We dismiss, therefore, from consideration, the claim, suggested rather than urged in behalf of the Government, that the ship and cargo, both or either, were destined for the blockaded coast."

But it was maintained in argument by counsel for the captors (1) that trade with Matamoras was, at the time of the capture, made unlawful by the blockade of the mouth of the Rio Grande; and, if this was not the case, (2) that the ulterior destination of the cargo was Texas and the other States in rebellion, and that this ulterior destination constituted a breach of the blockade.

On these points the court held—

1. That "the mouth of the Rio Grande was not included in the blockade of the ports of the rebel States, and that neutral commerce with Matamoras, except in contraband, was entirely free."

2. That "neutral trade to or from a blockaded country by inland navigation or transportation," is lawful; and, "therefore, that trade, between London and Matamoras, even with intent to supply from Matamoras goods to Texas, violated no blockade, and can not be declared unlawful." "Such trade," said the court, "with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country."

The question of breach of blockade being thus excluded, the court proceeded to consider the question of the destination of the cargo in connection with the question of contraband. Taking up the usual classification of articles with reference to this question—(1) those used primarily

for purposes of war, (2) those used for purposes of war or of peace according to circumstances, and (3) those used exclusively for peaceful purposes—the court observed that a considerable part of the cargo was of the third class and need not be further considered. A large part, perhaps, was of the second class, but as it was "not proved * * * to have been actually destined to belligerent use," it therefore could not, said the court, "be treated as contraband." "Another portion was, in our judgment," continued the court, "destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness and of articles described in the invoices as 'men's army bluchers,' 'artillery boots,' and 'government regulation gray blankets.' These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army."

With regard to these articles, which were adjudged to be condemned as contraband, the language of the court is to be specially noted. "It is true that even these goods," said the court, "if really intended for sale in the market of Matamoras, would be free of liability: for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

"And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. * * * Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though

primarily destined to Matamoras. We are obliged to conclude that the portion of the cargo which we have characterized as contraband must be condemned."

Restitution of the ship was decreed on payment of costs and expenses. This condition was imposed, notwithstanding the finding that her destination was neutral, (1) because the master, when brought to by the *Vanderbilt*, refused to send his papers on board; (2) because papers were destroyed on board the ship at the time of the capture; and (3) because it was the duty of the captors, since contraband was found on board "destined to the enemy," to bring the ship in for adjudication.

Case of the Science.—In two other Matamoras cases, decided at the same term, the Supreme Court decreed restitution, in the absence of proof of actual enemy destination. The first of these was that of the *Science.*[1] Chief Justice Chase, delivering the opinion of the court, stated that the evidence was "clear that the vessel and her outward cargo were neutral property, destined to neutral consignees at Matamoras, and that the cargo had actually been delivered as consigned." "Some of the proof," the court added, "tended to show that a portion of this cargo consisted of Confederate uniform cloth; but there was none showing destination to enemy territory or immediate enemy use. There was, therefore, nothing in the character of the vessel or of the outward cargo which warrants condemnation."

Case of the Volant.—At the same time the court decided the case of the *Volant*,[2] another Matamoras case. The Chief Justice, delivering the opinion, stated that the proof showed that the vessel was the property of a neutral merchant of the island of Jersey, documented as a British merchantman, and regularly cleared from London to Matamoras. The cargo was shipped by the charterers of the vessel for neutral owners, and consigned to neutrals at Matamoras, but had not been discharged at the time of capture. "It consisted," said the court, "in part of bales of Confederate uniform cloth, of the same mark and of corresponding numbers with like goods found on the

[1] 5 Wallace, 178. [2] 5 Wallace, 179.

Science; but there is no proof of unlawful destination." The decree of the court below, condemning the ship and cargo, was accordingly reversed.

Hall, referring to the cases in which the English prize courts have applied the doctrine of continuous voyages, states that those courts "were careful not to condemn until what they conceived to be the hostile act was irrevocably entered upon" by departure "from the port of colorable importation to the enemy country;" and he declares that "the American decisions have been universally reprobated outside the United States, and would probably now find no defenders in their own country."[1] He does not cite, however, any case in which it was held by an English court that the performance of the process of "colorable importation" was a prerequisite to condemnation, nor does he exhibit his usual accuracy in his censure of the American decisions, which found, as will be shown, a defender in his own Government.

In the cases of the *Susan* and the *Hope*,[2] neutral American vessels were condemned by Sir William Scott for carrying, on voyages from Bordeaux to the neutral port of New York, official dispatches destined to French authorities in the West Indies. In neither case does it appear to have been alleged that the apparent destination of the vessel was not her true and final destination, or that she was specially employed by the French Government. Nevertheless, it was held that the transportation of the dispatches toward their belligerent destination was an unneutral and prohibited service.

Returning to the American decisions, it appears that on February 20, 1864, Earl Russell instructed Lord Lyons, then British minister at Washington, that Her Majesty's Government had considered the judgment of Judge Betts in the case of the *Springbok*, in communication with the law officers of the Crown, and saw no reason to change the opinion that they "could not officially interfere in the matter, but that the owners must be left to the usual and proper remedy of an appeal. On the contrary," declared Earl Russell, "a careful perusal of this

[1] Int. Law, 4th ed., 695, note.

[2] The Caroline, 6 C. Rob., 641, note.

elaborate and able judgment, containing the reasons of the judge, the authorities cited by him in support of it, and the important evidence properly invoked from the cases of the *Stephen Hart* and the *Gertrude* (which Her Majesty's Government have now seen for the first time) in which the same parties were concerned, goes so far to establish that the cargo of the *Springbok*, containing a considerable portion of contraband, was never really and *bona fide* destined for Nassau, but was either destined merely to call there or to be immediately transshipped after its arrival there without breaking bulk and without any previous incorporation into the common stock of that colony, and then to proceed to its real destination, being a blockaded port. The complicity of the owners of the ship, with the design of the owners of the cargo, is, to say the least, so probable on the evidence that there would be great difficulty in contending that this ship and cargo had not been rightly condemned."

February 5, 1868, the attorney of the owners of the cargo transmitted to Lord Stanley, then foreign secretary, the sentence of the Supreme Court, by which the condemnation of the cargo was affirmed and a decree of restitution entered as to the vessel. He also enclosed a copy of the joint opinion of Messrs. George Mellish, Q. C., and W. Vernon Harcourt, Q. C., holding the sentence to be erroneous and unjust, and stated that in that opinion he had no doubt the law officers of the Crown would concur. He asked that compensation be demanded for the owners of the cargo from the United States for the condemnation of their property.

This petition was referred to the law officers of the Crown, and on July 24, 1868, the foreign office, after an extended review of the papers in the case, including the opinion of counsel, announced the conclusion that Her Majesty's Government would not be "justified, on the materials before them, in making any claim" for compensation. With reference to the opinion of counsel, the foreign office observed that it found fault with the judgment because one ground taken by the court as justifying the conclusion that Nassau was not the real destination of the cargo, was derived from the forms of the bills of

lading, which, although they did not disclose the contents of the packages or name any consignee, the cargo being deliverable to "order or assigns," were, it was maintained, on the testimony of some of the principal brokers of London, "in the usual and regular form of consignment to an agent for sale at such a port as Nassau." No doubt, said the foreign office, the form was usual in time of peace; but a practice which might be "perfectly regular in time of peace under the municipal regulations of a particular state, will not always satisfy the laws of nations in time of war, more particularly when the voyage may expose the ship to the visit of belligerent cruisers." Thus it was laid down by Dr. Lushington, in the case of the *Abo*,[1] that where cargo is shipped *flagrante bello*, the bills of lading on their face ought to express for whose account and risk the property was shipped. The ship's manifest in the present case was, said the foreign office, equally silent on the subject; and, "having regard to the very doubtful character of all trade ostensibly carried on at Nassau during the late war in the United States, and to many other circumstances of suspicion before the court, Her Majesty's Government are not disposed to consider the argument of the court on this point as otherwise than tenable."

As to the argument of counsel that the character of the cargo, being fitted for blockade running, was a proof that it was destined for Nassau, which was the great entrepôt for contraband of war, the foreign office declared that it was one "to which much weight can not be attached." Under "all the circumstances of time and place," and in the absence of evidence from the claimants as to what was to become of the goods on their arrival at Nassau, Her Majesty's Government thought "the court was entitled to draw the inference that the consignors of the goods intended to be parties to the immediate transshipment and importation of these goods into a blockaded port, on their being taken out of the *Springbok*."

In connection with the contention of counsel that the court erred in its statement that the *Gertrude* was at Nassau with undenied intent to run the blockade about the

[1] Spinks, 350.

time when the *Springbok* was expected to arrive there, the foreign office observed that the decision of the court did not appear to be based on that ground, but found "that the owners of the cargo intended that it should be transshipped at Nassau in some vessel more likely to succeed in reaching a blockaded port than the *Springbok*." As a fact, said the foreign office, the voyage of the *Gertrude* appeared to have been delayed, but "when she did reach Nassau, after the capture of the *Springbok*, she took on board a contraband cargo, upon which the marks and numbers corresponded to some extent with certain marks and numbers on many packages in the *Springbok*, and she was captured and condemned without any attempt being made to resist such condemnation."[1]

In the case of the *Peterhoff*, it appears that the British consul at New York on August 3, 1863, transmitted to his Government a copy of Judge Betts's decree condemning the vessel and her cargo, and stated that the judge would later deliver *in extenso* his reasons for the condemnation. With reference to the decree, Earl Russell instructed Lord Lyons, Oct. 31, 1863, that Her Majesty's Government, having considered the judicial proceedings, in communication with the law officers of the Crown, adhered to the opinion that any official intervention in the present stage of the case was inexpedient. "The evidence," said Earl Russell, "is certainly not 'clearly and unequivocally inadequate to sustain the sentence,' but, on the contrary, in various particulars tends to sustain it; such as the false swearing of the master or, at least, the palpable equivocation and disingenuousness of his evidence; the throwing overboard of papers, the contents of which are said to be unknown at the moment of capture; the incredible and conflicting suggestions (in the absence of a true explanation which the claimants might have obtained) as to their contents, and the character of certain portions of the cargo."

April 22, 1864, the full opinion of Judge Betts in the case of the *Peterhoff* having been received, as well as that of Judge Marvin in the cases of the *Dolphin* and the *Pearl*, Earl Russell instructed Lord Lyons, after consulting the

[1] Blue Book, Miscellaneous, No. 1 (1900).

law officers of the Crown, that Her Majesty's Government did not consider that the decisions in the cases of the *Peterhoff* and the *Dolphin* called "for any intervention on their part. Her Majesty's Government," continued Earl Russell, "without adopting all the reasons assigned in these judgments (in some of them, indeed, they do not concur), are not prepared to say that the decisions themselves, under all the circumstances of the cases, are not in harmony with the principles of the judgments of the English prize courts. With respect to the case of the *Pearl*, Her Majesty's Government consider that the course adopted by the judge is fair and equitable."[1]

In the cases of the *Springbok*, *Peterhoff*, *Dolphin*, and *Pearl*, claims for compensation were made before the international commission under Art. XIII of the Treaty of Washington of May 8, 1871. None was presented in the case of the *Bermuda*.

In the case of the *Springbok* the commission unanimously disallowed all claims on account of the cargo. An award of $5,065 was made as damages for the detention of the vessel from the date of the decree of the district court till her discharge under the decree of the Supreme Court.[2]

The *Peterhoff* claims were all unanimously disallowed.[3]

The cases of the *Dolphin* and the *Pearl* were similarly disposed of.[4]

The commission consisted of the Hon. J. S. Frazer, sometime a justice of the supreme court of the State of Indiana; the Rt. Hon. Russell Gurney, a member of Her Majesty's privy council and recorder of London, and Count Corti, Italian minister at Washington.[5]

When we consider on the one hand the not infrequent censure of the American decisions as introducing novel and unwarranted doctrines, and on the other hand the contrary opinion expressed by the British Government and implied by the action of the international commision,

[1] Blue Book, Miscellaneous, No. 1 (1890).

[2] Int. Arbitrations, III, 3928–3935.

[3] Int. Arbitrations, III, 3837–3843.

[4] Hale's Report, 92, 115.

[5] Int. Arbitrations, I, 690.

it seems not inappropriate to recall the words of Lord Stowell:[1]

"All law is resolvable into general principles: The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not *new*, nor is it justly chargeable with being *an innovation* on the ancient law, when, in fact, the court does nothing more than apply old principles to new circumstances."

III. *Delagoa Bay: German cases.*—An interesting and important discussion of questions of contraband and continuous voyage may be found in the correspondence between Germany and Great Britain growing out of the seizure and detention by British cruisers of the three German east African mail steamers *Bundesrath*, *General*, and *Herzog*.

The first case was that of the *Bundesrath*. As early as Dec. 5, 1899, Rear Admiral Sir R. Harris reported that that vessel had sailed from Aden for Delagoa Bay; that "ammunition" was "suspected, but none ascertained;" and that she carried "twenty Dutch and Germans and two supposed Boers, three Germans and two Austrians, believed to be officers, all believed to be intending combatants, although shown as civilians; also twenty-four Portuguese soldiers."[2] On the 29th of December she arrived at Durban in charge of the British cruiser *Magicienne*. The German Government requested her release on the ground, among others, of "positive assurances" given by the Hamburg Company that she carried no contraband. Lord Salisbury replied that she "was suspected to be carrying ammunition in her cargo, and that she had on board a number of passengers believed to be volunteers for service with the Boers," but that no details as to the grounds of the seizure had been received. Subsequently the British Government was advised by Admiral Harris that the ship changed the

[1] The Atalanta (1808), 6 C. Rob., 440, 458.

[2] Africa, No. 1 (1900), 1.

position of her cargo on being chased; that a partial search had revealed some sugar consigned to a person at Delagoa Bay, and some railway sleepers and small trucks consigned to a firm at the same place, but labelled Johannesburg; and that a further search was expected to disclose "arms among baggage of Germans on board, who state openly they are going to the Transvaal." The German Government declared that it had no knowledge of more than two officers having proceeded to the Transvaal, where they were unable to obtain commands. On Jan. 3, 1900, the British Government directed that an application be made to the prize court for the release of the mails; that, if the application should be granted, they be handed over to the German consul, to be hastened to their destination by a British cruiser if available, or by mail steamer, or otherwise; and that every facility for proceeding to his destination should be afforded "to any passenger whom the court considers innocent." The search of the steamer was continued for nine days, but no contraband was found. Jan. 5 the mails and passengers were released by order of the prize court, and were taken on board the German war ship *Condor* for Delagoa Bay. The steamer and her cargo was discharged on the 18th of January.

Dec. 16, 1899, the Admiralty communicated to the foreign office two telegrams, one from the commander in chief of the Mediterranean Station, and the other from the commander in chief at the Cape of Good Hope, in relation to the *Herzog*. One of the telegrams conveyed a report that this steamer, though she had declared that there were no troops on board, had left the Suez Canal for South Africa with "a considerable number of male passengers, many in khaki, apparently soldiers;" the other spoke of "a number of passengers dressed in khaki," and asked whether they could be legally removed. Dec. 21 the senior naval officer at Aden reported her as having sailed on the 18th for Delagoa Bay "conveying, probably for service in [the] Transvaal, about forty Dutch and German medical and other officers and nurses." Jan. 1, 1900, the Admiralty telegraphed to Admiral Harris: "Neither the *Herzog* nor any other German mail steamer should be arrested on

suspicion only until it becomes obvious that the *Bundesrath* is carrying contraband." The *Herzog* was brought into Durban on the 6th of January. It seems that she had among her passengers three Red Cross expeditions, one of which, however, had no official character nor any connection with the regular Red Cross societies. Jan. 7 the Admiralty directed her immediate release unless guns or ammunition were revealed by the summary search. To this there was added next day the further proviso, "unless provisions on board are destined for the enemy's government or agents, and are also for the supply of troops or are specially adapted for use as rations for troops." The steamer was released on the 9th of January.

Jan. 4, 1900, the senior naval officer at Aden reported that the steamer *General* was detained "on strong suspicion" and was undergoing search. The German Government protested, and asked that explicit instructions be given to British officers "to respect the rules of international law, and to place no further impediments in the way of the trade between neutrals"—a request to the form and imputations of which the British Government strongly excepted. The Admiralty had previously telegraphed to Aden that it was undesirable to detain the steamer if she carried the mails. It appears that she was detained on "information" that various suspicious articles were on board for Delagoa Bay, including boxes of ammunition stowed in the main hold, buried under reserve coal. The manifest contained several large cases of rifle ammunition for Mauser, Mannlicher, and sporting rifles, consigned to Mombasa, but this consignment was believed to be *bona fide*. After a search, which included the removal of 1,200 tons of cargo and the digging out of a large quantity of coal—a task which occupied the *Marathon's* ship's company, assisted by 100 coolies, several days—no contraband was found. The British Government ordered the vessel's release on the 7th of January, but, as time was requisite for the replacement of the 1,200 tons of cargo which had then been removed, she was unable to sail till the 10th. She had on board a considerable number of Dutch and German passengers for the

Transvaal, in plain clothes, but "of military appearance," some of whom were believed to be trained artillerymen, though it was stated by the British officials that proof of this suspicion could be obtained only by searching their baggage. Lord Salisbury afterwards stated that "there was no sufficient evidence as to their destination to justify further action on the part of the officers conducting the search."

With the release of the ships and their passengers and cargoes, and an expression of regret by Great Britain for what had occurred, the subject in controversy was arranged as follows:

1. The British Government admitted in principle the obligation to make compensation, and expressed its readiness to arbitrate the claims should an agreement by other means be impracticable.

2. Instructions were issued to prevent the stopping and searching of vessels at Aden or at any point equally or more distant from the seat of war.

3. It was agreed provisionally, till another arrangement should be made, that German mail steamers should not in future be searched on "suspicion only." By a mail steamer, however, was understood not every steamer that had a bag of letters on board, but a steamer flying the German mail flag.

On the other hand, the German Government substantially modified its original position with regard to the questions of international law involved. In a note to Lord Salisbury, of January 4, 1900, Count Hatzfeldt, German ambassador at London, declared it to be the opinion of his Government that prize proceedings in the case of the *Bundesrath* were not justified, for the reason that, no matter what may have been on board, "there could have been no contraband of war, since, according to recognized principles of international law, there can not be contraband of war in trade between neutral ports." He also declared this to be the view taken by the British Government in 1863 as against the judgment of the American prize court in the case of the *Springbok;* and by the British Admiralty in the Manual of Naval Prize Law, in 1866.

Lord Salisbury, in his reply of the 10th of January, pointed out the error of the German Government as to the case of the *Springbok*. As to the Manual of Naval Prize Law, he declared that, while its directions were for practical purposes sufficient for wars such as Great Britain had waged in the past, they were "quite inapplicable to the case which has now arisen of war with an inland state, whose only communication with the sea is over a few miles of railway to a neutral port." He also adverted to the fact that the author of the Manual, in another part of the work than that cited, had discussed "the question of destination of the cargo, as distinguished from destination of the vessel, in a manner by no means favorable to the contention advanced in Count Hatzfeldt's note," and that Professor Holland, who edited a revised edition of the Manual in 1888, had, in a recent letter in *The Times*, expressed an opinion altogether inconsistent with that which the German Government had endeavored to found on its words. Lord Salisbury stated that, in the opinion of Her Majesty's Government, the passage cited from the Manual, "that the destination of the vessel is conclusive as to the destination of the goods on board," could not apply to "contraband on board of a neutral vessel if such contraband was at the time of seizure consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country," and that the true view in regard to such goods, as Her Majesty's Government believed, was correctly stated by Bluntschli, as follows: "If the ships or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war and confiscation will be justified."[1]

In his speech in the Reichstag, January 19, 1900, announcing the arrangement with Great Britain, Count von Bülow laid down certain propositions as constituting a system of law which should be operative in practice, and a disregard of which would constitute a breach of international treaties and customs. One of these propositions was that by the

[1] Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi il y aura contrebande de guerre et la confiscation sera justifiée. (Droit Int. Codifié, ed. 1874, § 813.)

term *contraband of war* "only such articles or persons are to be understood as are suited for war, and at the same time are destined for one of the belligerents." Count von Bülow added that the Imperial Government had striven from the outset to induce the English Government, in dealing with neutral vessels consigned to Delagoa Bay, "to adhere to that theory of international law which guarantees the greatest security to commerce and industry, and which finds expression in the principle that, for ships consigned from neutral states to a neutral port, the notion of contraband of war simply does not exist. To this the English Government demurred. We have reserved to ourselves the right of raising the question in the future, in the first place, because it was essential to us to arrive at an expeditious solution of the pending difficulty, and, secondly, because, in point of fact, the principle here set up by us has not yet met with universal recognition in theory and practice."

IV. *Delagoa Bay: American cases.*—Contemporaneously with the British-German controversy, a question arose between the United States and Great Britain as to the seizure of various articles shipped at New York, some of them on regular monthly orders, by American merchants and manufacturers on the vessels *Beatrice*, *Maria*, and *Mashona*, which were seized by British cruisers while on the way to Delagoa Bay. These articles consisted chiefly of flour, canned meats, and other food stuffs, but also embraced lumber, hardware, and various miscellaneous articles, as well as quantities of lubricating oil, which were consigned partly to the Netherlands South African Railway, in the Transvaal, and partly to the Lourenço Marques Railway, a Portuguese concern. It was at first supposed that the seizures were made on the ground of contraband, and with reference to this possibility the Government of the United States declared that it could not recognize their validity "under any belligerent right of capture of provisions and other goods shipped by American citizens in ordinary course of trade to a neutral port."[1]

It soon transpired, however, that the *Beatrice* and

[1] Mr. Hay, Sec. of State, to Mr. Choate, ambassador at London, tel., Jan. 2, 1900, S. Doc. 173, 56 Cong., 1 sess., 13–14.

Mashona, which were British ships, and the *Maria*, which, though a Dutch ship, was at first supposed to be British,[1] were arrested for violating a municipal regulation forbidding British subjects to trade with the enemy, the alleged offense consisting in the transportation of goods destined to the enemy's territory. The seizure of the cargoes was declared to be only incidental to the seizure of the ships. As to certain articles, however (particularly the oil consigned to the Netherlands South African Railway in the Transvaal), an allegation of enemy's property was made; but no question of contraband was raised and it was eventually agreed that the United States consul-general at Cape Town should arrange with Sir Alfred Milner, the British high commissioner, for the release or purchase by the British Government of any American-owned goods, which, if purchased, were to be paid for at the price they would have brought at the port of destination at the time they would have arrived there in case the voyage had not been interrupted.[2]

In the course of the correspondence Lord Salisbury thus defined the position of Her Majesty's Government on the question of contraband:

"Foodstuffs, with a hostile destination, can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of seizure."[3]

Mr. Thomas Gibson Bowles, in a letter in the London *Times*, January 4, 1900, says: "In July, 1896, the Dutch steamer *Doelwijk* took a cargo of arms and ammunition, destined to Abyssinia, then at war with Italy, from the neutral port of Rotterdam to the neutral (French) port of Jibutil, in the Gulf of Tajura. The steamer being captured by the Italian cruiser *Etna* and brought in for adjudication, was condemned as lawful prize by the prize court at Rome on December 8, 1896."[4]

[1] S. Doc. 173, 56 Cong., 1 sess., 16.

[2] Mr. Hay, Sec. of State, to Mr. Toomey, March 2, 1900; to the Ballard & Ballard Co., March 9, 1900; to Mr. Newman, March 13, 1900: 243 MS. Dom. Let., 317, 412, 488.

[3] S. Doc. 173, 56 Cong., 1 sess., 29.

[4] S. Doc. 173, 56 Cong., 1 sess., 21–22.

SITUATION III.

Two countries, on the verge of war, summon home all their military and naval officers. When war is declared, an officer of one of the belligerents, of high rank, whose presence is specially desired for important service, is on the high seas, as a passenger on a neutral ship, bound to an intermediate neutral port, where he intends to take passage by another vessel for a port in his own country, or to enter upon active service on one of its men-of-war, should any call.

May the ship on which the officer is sailing be captured as prize by a cruiser of the enemy, or may the officer be taken out and the ship be permitted to proceed?

SOLUTION.

The answer to the foregoing question involves the consideration (1) of the right of a belligerent to prevent the transportation by a neutral ship of persons in the military service of the enemy and (2) of the destination of the officer in the case stated.

1. *Right of the belligerent.*—It is admitted that a neutral vessel engaged in the carriage of persons in the service of a belligerent becomes liable to condemnation either when the belligerent "has so hired it that it has become a transport in his service and that he has entire control over it, or when the persons on board are such in number, importance, or distinction, and at the same time the circumstances of their reception are such, as to create a reasonable presumption that the owner or his agent intend to aid the belligerent in his war."[1] This rule leaves open the question as to the carriage of persons in the service of a belligerent by a neutral vessel in the ordinary course of trade. The view has been expressed that if such persons may be classed as contraband the vessel may be seized and brought in for adjudication: but that if they may not be so classed the vessel in which they are traveling remains a ship under neutral

[1] Hall, International Law, 4th ed., p. 701.

jurisdiction which has not been brought by the conduct of the persons having control over it within the scope of those exceptional rights in restraint of trade which belligerents have been allowed to assume.[1] On the other hand, the view has been expressed that "it is incorrect to speak of the conveyance of persons in the military or civil employment of a belligerent as if it were the same thing as the conveyance of contraband of war, or as if the same rules were applicable to it. It is a different thing, and the rules applicable to it are different."[2] Apparently the great majority of writers treat the transportation of persons in the military service of the enemy either as a carriage of contraband or as an act analogous thereto. It is probable, however, that too much importance has been given to this somewhat technical aspect of the matter, since it seems to be generally agreed that the carriage of such persons to a military destination is an enemy service far more important than the carriage of contraband. From the belligerent's point of view the importance of the act consists not in the manner or in the motive with which it may be done, but in the aid rendered to the enemy. Whether the circumstances of the transportation may or may not be such as to render the vessel liable to confiscation, it is reasonable to hold that it is a right of the belligerent to take proper measures to prevent the enemy from receiving military aid under the protection of a neutral flag. As to the number of military persons necessary to subject the vessel to confiscation no rule can be laid down. "To carry a veteran general under some circumstances might be a much more noxious act than the conveyance of a whole regiment."[3]

2. *Destination.*—Upon the facts stated, the destination of the officer in question, though he is immediately bound to a neutral port, appears to be in reality belligerent. It has been declared that even provisions which, although destined to the enemy's country, are not in general contraband, are to be deemed such "if destined for the army or navy of the enemy or for his ports of naval or

[1] Hall, International Law, 4th ed., p. 705.

[2] Mountague Bernard, quoted by Hall, International Law, 4th ed., p. 708.

[3] Lawrence's Wheaton, edition of 1863, p. 802.

military equipment."[1] The destination of the officer in question for "military use" is, in the case stated, evident.

Conclusion.—Although the case of the *Trent* related to persons in the diplomatic and not in the military service of the enemy, a considerable majority of the authorities seem to concur in the opinion that the discussion which then took place resulted in a general understanding that in the absence of a treaty it is no longer allowable to take persons out of a neutral ship, but that the ship herself, with the noxious persons on board, must be brought in for judicial examination. In the case stated, therefore, the ship should be seized and brought in with the officer on board. The fact that he embarked before the declaration of war doubtless would be taken into consideration by the prize court in making up its judgment. While such a circumstance might materially affect the question of the ship's culpability, it would not appear to destroy, any more than in the case of contraband, the right of the belligerent to prevent his enemy from receiving military aid under cover of a neutral flag.

NOTES ON SITUATION III.

The "Instructions to blockading vessels and cruisers," issued by the Navy Department during the war with Spain,[2] contained the following clause:

"16. A neutral vessel in the service of the enemy, in the transportation of troops or military persons, is liable to seizure."

Stockton's Naval War Code contains a similar but amplified provision as follows:

"ART. 16. Neutral vessels in the military or naval service of the enemy, or under the control of the enemy for military or naval purposes, are subject to capture or destruction."

It is to be observed, however, that in this clause nothing is expressed as to the transportation of troops or military persons, the design appearing to be to class as a punishable act the performance by a neutral vessel of military or naval services for the enemy, perhaps under the latter's immediate employment or control.

[1] The Commercen, Wheaton, 382.

[2] General Orders No. 492, June 20, 1898.

Another provision of the code which may be cited here reads as follows:

"ART. 35. Vessels, whether neutral or otherwise, carrying contraband of war destined for the enemy are liable to seizure and detention, unless treaty stipulations otherwise provide."

This clause would cover the carriage of military persons, should such persons be admitted to fall within the category of contraband.

In numerous treaties running back to the seventeenth century, a provision may be found in connection with the subject of contraband to the effect that the persons of enemies shall not be taken out of free ships unless they are military persons in the actual service of the enemy. Such a clause may be found in various treaties entered into by the United States with foreign powers. Article XXIII of the treaty of amity and commerce with France of February 6, 1778—the first treaty concluded by the United States—stipulated that free ships should make free goods, and in connection therewith that the same liberty should be extended to persons on board such ships, so that, "although they be enemies to both or either party, they are not to be taken out of that free ship unless they are soldiers and in actual service of the enemies." A similar clause may be found in Article XIV of the treaty with France of September 30, 1800; in Article XI of the treaty with the Netherlands of October 8, 1782; in Article VII of the treaty with Sweden of April 3, 1783, and in various other early treaties, most of which have ceased to be in force. A similar provision has, however, been included by the United States in various recent or comparatively recent conventions. It may be found in Article XV of the treaty with New Granada (Colombia) of December 12, 1846; in Article XVI of the treaty with Bolivia of May 13, 1858; in Article XIX of the treaty with Hayti of November 3, 1864; in Article XVI of the treaty with Italy of 1871; in Article XVII of the treaty with Peru of August 31, 1887. The usual form of the clause in these later treaties is that the freedom of the ship shall extend to persons on board, even if they be enemies, "unless they are officers or soldiers in the actual service of the enemy."

These clauses obviously imply that officers and soldiers in the actual service of the enemy may be taken out of a neutral ship without judicial proceedings. In this respect they bear the trace of their origin in a time when the authority and necessity of prize adjudication were not so well settled and understood as now; and when the claims of belligerents to interdict neutral intercourse with their enemies, and neutral carrying trade of persons and goods, were almost unlimited, and their practices loose and irregular.[1] Although they must be conceded to possess, in existing treaties, the force of law as between the contracting parties, their perpetuation is perhaps to be ascribed rather to the habit of employing ancient forms than to intelligent design, and it would therefore be unsafe to assume that the act which they authorize would be admitted to-day in the absence of an express treaty stipulation. Nevertheless, they clearly exemplify the opinion that the transportation on the high seas of military persons in actual service is an act the consummation of which the adverse belligerent has a right to prevent.

Frequent reference is made to certain decisions of Sir William Scott in cases involving the carriage of military persons or of official dispatches. These cases are reviewed by Dana, in a note to his edition of Wheaton (pp. 640–643). His summaries are generally accurate, but in a few particulars they do not appear to be borne out by the printed record, while in the cases relating to official dispatches he fails to disclose certain points of crucial importance.

The principal cases decided by Sir William Scott in relation to the carriage of military persons are those of the *Carolina*, 4 C. Rob., 256, April 30, 1802; the *Friendship*, 6 C. Rob., 420, August 20, 1807; and the *Orozembo*, 6 C. Rob., 430, September 24, 1807. In each of these cases the vessel was condemned as a transport of the enemy, engaged, either under contract or under duress, in the carriage of military persons. In the case of the *Friendship*, Sir William Scott said: "It is asked, Will you lay down a principle that may be carried to the length of preventing a military officer, in the service of the enemy, from finding

[1] Bernard, Case of The Trent, 14–20, cited by Dana, Note to Wheaton, 657.

his way home in a neutral vessel from America to Europe? If he was going merely as an ordinary passenger, as other passengers do, and at his own expense, the question would present itself in a very different form. Neither this court, nor any other British tribunal, has ever laid down the principle to that extent. This is a case differently composed."

The question of a military officer in the service of the enemy "finding his way home in a neutral vessel" was thus expressly reserved. In the same case, however, Sir William Scott, referring to the transportation of military persons for a belligerent, observed: "Shall it be said then that this is an innoxious trade, or that it is an innocent occupation of the vessel? What are arms and ammunition in comparison with men, who may be going to be conveyed, perhaps to renew their activity on our shores?" Discussing, in the case of the *Orozembo*, the question of the number of the persons carried, he declared: "Number alone is an insignificant circumstance * * *, since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition. To send out one veteran general of France to take the command of the forces at Batavia, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater; and therefore it is what the belligerent has a stronger right to prevent and punish."

With regard to Sir William Scott's decisions as to the carriage of official dispatches, it is to be observed (1) that, in cases in which the vessel, or the vessel and cargo, were condemned, he proceeded not upon the ground of governmental employment, but simply upon that of the aid rendered, knowingly or fraudulently, to the enemy; and (2) that, in cases in which, knowledge or fraud not being proved, the vessel was restored, the claimants were required to pay the captors' expenses. Thus, in the case of The *Rapid*, Edward's Adm. 228, 1810, Sir William Scott, in pronouncing sentence of restitution, declared that "in this, as in every other instance in which the enemy's dispatches are found on board a vessel," the master had, "by failing to exercise the utmost jealousy," and in spite of

the fact that his voyage was to terminate in a neutral country, "justly subjected himself to all the inconveniences of seizure and detention, and to all the expenses of those judicial inquiries which they have occasioned." Moreover, in reference to the nature and importance of the act in question, Sir William Scott on another occasion said: "The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of dispatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other belligerents in that quarter of the world." [1]

The practical futility of attempting to base a final solution of the question under consideration upon the mere form of the agreement under which military persons in the service of the enemy are transported—whether they are carried under a contract with the government or merely as "passengers"—may be vividly illustrated by a correspondence which took place during the revolution in Chile in 1891.

In a dispatch to Lord Salisbury of Aug. 12, 1891, Mr. Kennedy, British minister at Santiago, reported that on the 26th ultimo he had learned from the agent of the Pacific Steam Navigation Company, a British concern, at Valparaiso, that the company's steamer *Iberia* had been detained by the authorities two days at Coronel, in order to embark soldiers for the Government, and that the company's agent at Coronel, in explanation of his action, which was contrary to his instructions, stated that his objections were overruled by the governor of Coronel, who satisfied him that the soldiers were embarked under Mr. Kennedy's authority and by his orders. On August 3rd Mr. Kennedy wrote to Señor Zañartu, the minister for foreign affairs, and requested an explanation of this statement of the governor, at the same time denying that he had given any orders or authority in the matter.

Accompanying the dispatch there was a note of Mr. Kennedy to Señor Zañartu, of July 15, 1891, acknowledg-

[1] The *Atalanta*, 6 C. Rob. 440, March 4, 1808. See also The *Caroline*, 6 C. Rob. 461, April 1, 1808; The *Constantia*, ibid.; The *Susan*, ibid.; The *Hope*, ibid.; The *Madison*, Edward's Adm., 224 (1810); The *Rapid*, Edward's Adm., 228 (1810).

ing the receipt of a note of the latter, stating that the Government desired immediately to ship, by the *Iberia*, 400,000 silver dollars to Montevideo, and also a certain number of individuals, not possessed of any special character, to Punta Arenas, and inquiring whether the money and the passengers could count, in case of seizure by the revolutionary squadron, on the protection of the British flag, in the sense of exacting the release of the individuals and the restitution of the specie. Mr. Kennedy, in reply, referred to similar assurances given by him in regard to British vessels carrying wheat to Europe, and to the concurrence of Her Majesty's senior naval officer on the station in them.

There was also a letter of Mr. Prain, the company's agent at Valparaiso, to Mr. Kennedy of July 25, 1891, expressing surprise at the reports from Coronel, especially as Mr. Kennedy had warned him in a private letter not to receive "fighting men" on board as passengers, since by so doing the steamers would run the risk of getting into trouble in which Her Majesty's representatives would not be able to help them.

In a letter to Mr. Prain of August 3, 1891, Mr. Kennedy said:

"I privately conveyed to you, in the interests of your company, the opinion expressed to me by Admiral Hotham on the general question of conveyance of troops, stores, etc., but I abstained from concurring officially in that opinion as regards the Pacific Steam Navigation Company."

In his dispatch of August 12, Mr. Kennedy, referring to this correspondence, said:

"As regards the alleged illegality of the above shipments as asserted by the Oppositionists and their sympathizers, I beg to state that the Pacific Steam Navigation Company are bound under their contract to carry soldiers, military stores, etc., excepting in the case of war between two republics on this coast; but, as the Chilean Government are now engaged in the suppression of a rebellion, the above exemption, I venture to think, does not apply. It is true that in reply to Mr. Prain's private and confidential inquiry I privately reminded him that Admiral Hotham had given a general opinion against the transport

of soldiers and stores by British ships; but I did this to help Mr. Prain in his efforts to induce the authorities to send their soldiers on board his ship as private passengers, so as not to compromise his position with the Opposition, for whom he has strong sympathies, and in the success of whose cause he is an enthusiastic believer. But, as your lordship will perceive, I decline to commit myself officially to the opinion that the Pacific Steam Navigation Company would, under present circumstances, commit a breach of neutrality in transporting troops for the Chilean Government."[1]

The purport of Mr. Kennedy's suggestion appears to be that, if the persons in question were transported as "troops for the Chilean Government," the act might be considered culpable; but that if the same persons, who were in fact soldiers in the service of that Government, were taken on board as "private passengers," the ship would not be "compromised" by their transportation. Perhaps a touch of irony may be detected in Mr. Kennedy's suggestion, since it was not entirely harmonious with the private advice which he gave on the strength of Admiral Hotham's opinion.

In the neutrality proclamation issued by the British Government April 23, 1898, in respect of the war between the United States and Spain, the acts against which British subjects were warned as being in derogation of their duty as neutrals, or in contravention of the law of nations, comprised the "carrying" of "officers, soldiers, dispatches, arms, ammunition, military stores or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usages of nations, for the use or service of either of the said powers."[2]

In the late controversy between Germany and Great Britain growing out of the seizure and detention by British cruisers of the German East African mail steamers *Bundesrath*, *General*, and *Herzog* it appears that one of the grounds on which the steamer first mentioned was seized was that she carried "twenty Dutch and Germans and two supposed Boers, three Germans and two Austrians

[1] Chile, No. 1 (1892), 236–242.

[2] Proclamations and Decrees during the War with Spain, 35.

believed to be officers, all believed to be intending combatants, although shown as civilians." In reply to the request of the German Government for the vessel's release Lord Salisbury stated, among other things, that she "had on board a number of passengers believed to be volunteers for service with the Boers." It was subsequently stated that the search of the ship was expected to disclose "arms among baggage of Germans on board, who state openly they are going to the Transvaal." The German Government declared that it had no knowledge of more than two of its officers having proceeded to the Transvaal, where they were unable to obtain commands. The British Government subsequently directed that every facility for proceeding to his destination should be afforded "to any passenger whom the court considers innocent." The steamer and her cargo were afterwards discharged. In the case of the *Herzog* it was alleged, among other things, that she had on board "a considerable number of male passengers, many in khaki, apparently soldiers." It turned out that she had among her passengers three Red Cross expeditions. The *General* was said to have on board a considerable number of Dutch and German passengers for the Transvaal in plain clothes, but "of military appearance," some of whom were believed to be trained artillerymen. Lord Salisbury afterwards stated that "there was no sufficient evidence as to their destination to justify further action on the part of the officers conducting the search."

In none of these cases was it alleged that the suspected persons were soldiers in the actual service of the enemy. They seem rather to have been looked upon as contraband, as material immediately useful in war. In this relation it is to be observed that Count von Bülow, in a speech in the Reichstag, January 19, 1901, laid down certain propositions of international law, one of which was that by the term contraband of war, "only such articles or persons are to be understood as are suited for war, and at the same time are destined for one of the belligerents." By this definition Count von Bülow seems to have concurred in the opinion apparently entertained by Lord Salisbury, that the transportation of persons suited for war

and destined for a belligerent may be dealt with as a case of contraband, without regard to the question whether such persons are in the actual service of the enemy.

This opinion accords with that of Bluntschli, who says:

"§ 815. The transportation of troops or of general officers forming part of belligerent armies, on neutral ships, is assimilated to the transportation of materials of war and is regarded as contraband. The troops or officers may be made prisoners."

By troops he means not only a large force, but a small number of soldiers with an underofficer, for example; and he considers the same principle applicable to a military general officer without his command.[1]

Perels considers as prohibited the transportation of subjects of a belligerent power who are in the actual military service or who are liable to such service. (Das internationale öffentliche Seerecht, Berlin, 1882.)

Marquardsen thinks it an essential condition of seizure that the persons are in the actual military service of the enemy; and he holds that if Mason and Slidell had been military persons the question of the legality of their capture would have been one for the determination of the prize courts, although the *Trent* was not under contract with any government.[2]

Rivier, in his late work, says:

"Another application of the principles laid down concerns the transportation at sea, by neutral ships, of soldiers and sailors destined to a belligerent. According to a just opinion this transportation is forbidden to the neutral state, but not to its private citizens. The latter undertake it at their peril and risk. If, as we assume, the owner or the master of the ship is cognizant of the nature of the transportation, and that it is of sufficient importance, which is a question of fact, the injured belligerent may seize and confiscate the ship.[3]

See also Fiore, Droit International Public, III, 514, § 1602; Field, International Code, § 853; Creasy, First Platform of International Law, §§ 595, 596.

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[1] Le Droit Int. Codifié, Lardy's ed., Paris, 1881.

[2] Der Trent-Fall, 1862, chap. 10.

[3] Principes du Droit des Gens, II, 388.

The question of the transportation of military persons has been discussed and has formed the subject of resolutions by the Institute of International Law, not as a question of contraband, but as a question of prohibited transportation. In accordance with this view, the Institute, at its session in Venice in 1896, adopted the following resolutions:

"§6. It is forbidden to attack or oppose the transportation of diplomats or diplomatic couriers: 1st, neutrals; 2nd, those accredited to neutrals; 3rd, navigating under the neutral flag between neutral ports, or between a neutral port and the port of a belligerent.

"On the contrary, the transportation of the diplomats of an enemy accredited to his ally is, except it be in the course of regular and ordinary traffic, prohibited: 1st, on the territories and waters of the belligerents; 2nd, between their possessions; 3rd, between the allied belligerents.

"§7. The transportation of troops, military men, or military agents of an enemy is forbidden: 1st, in the waters of the belligerents; 2nd, between their authorities, ports, possessions, armies, or fleets; 3rd—when the transportation is made on account of or by the order or mandate of the enemy, or to conduct to him (pour lui amener) either his agents with a commission for the operations of the war, or military persons already in his service, or auxiliaries or troops enrolled in violation of neutrality—between neutral ports, between those of a neutral and those of a belligerent, from a neutral point to the army or the fleet of a belligerent.

"The prohibition does not extend to the transportation of individuals who are not yet in the military service of a belligerent, even though their intention is to enter it, or who make the voyage as simple passengers without manifest connection with the military service.

"§ 8. The transportation of despatches (official communications between official authorities), between two authorities of an enemy, who are on land or ships belonging to or occupied by him, is prohibited, save in regular or ordinary traffic.

"The prohibition does not extend to transportation either between neutral ports or from or to some neutral territory or authority." [1]

In connection with the resolutions of the Institute, reference should be made to the work of M. Kleen, entitled "De la Contrebande de Guerre et des Transports Interdits aux Neutres," Paris, 1893, which he prepared especially for the elucidation of the questions before the Institute.

While the controversy between Germany and Great Britain, as to the seizure of the German mail steamers, was in its early stages, Prof. T. E. Holland, editor of the British "Admiralty Manual of the Law of Prize," in a letter dated Jan. 2, 1900, and published in the London *Times* of the next day, said:

"The carriage by a neutral ship of enemy troops, or of even a few military officers, as also of enemy dispatches, is an 'enemy service' of so important a kind as to involve the confiscation of the vessel concerned, a penalty which, under ordinary circumstances, is not imposed upon carriage of 'contraband' properly so called. See Lord Stowell's luminous judgments in *Orozembo* (6 Rob., 430) and *Atalanta* (id., 440). The alleged offense of the ship *Bundesrath* would seem to be of this description."

When this letter was written, the facts in the case of the *Bundesrath* had not been definitely ascertained; but, without regard to any particular case, it is obvious from the passage quoted that, where the transportation of military persons is in question, Professor Holland considers the carriage of the persons, and not the special letting out of the ship to a belligerent government for that purpose, as the gravamen of the charge of "enemy service," and that he interprets the decisions of Sir William Scott as authority for this view.

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[1] Annuaire, XV, 231–232.

SITUATION IV.

A United States naval force falls in with and subdues a naval force of the enemy engaged in convoying a fleet of merchant vessels. Among the latter is found a neutral vessel, bound to an unblockaded port, with a cargo containing nothing of a contraband character.

Should the vessel be released, or be brought before a prize court?

SOLUTION.

The question whether the acceptance by a neutral vessel of the convoy of a belligerent man-of-war is an illegal act, which in itself affords good ground for condemnation if such vessel be captured by the other belligerent, is one which has been much discussed and which has given rise to not a little divergence of opinion. The affirmative of the question is maintained by the English courts and English writers, and also by leading publicists of the United States, among whom may be mentioned Kent, Duer, Woolsey, and Dana.[1]

On the other hand, the Government of the United States on one occasion took the opposite ground, maintaining, in a controversy with Denmark which arose in 1810, that so long as the association of the neutral vessel with the belligerent convoy was not attended with any attempt at concealment or deceit, nor with any participation in the actual resistance of the convoying force, she did not lose her neutral character. In this controversy the United States was ultimately represented by Mr. Wheaton, who thus became committed to that view. But, while it was contended by Mr. Wheaton that the mere association, though voluntary, of the neutral vessel with the belligerent convoy did not justify condemnation, yet it was not denied by him that such association afforded ground for bringing in the vessel for adjudication, although he intimated in the course of his argument that in at least some of the cases before him there was no other association than that which

[1] Dana's Wheaton, 708, note 245.

resulted from an accidental and temporary coincidence of routes.

Mr. William Beach Lawrence, referring to the negotiation with Denmark, says: "That the success of the negotiation was, in a great degree, to be attributed to the personal character and special qualities of Mr. Wheaton can not be doubted by anyone who reads the passages which we have cited from eminent publicists."[1] In the passages thus referred to the view opposite to that expounded by Mr. Wheaton is maintained, and it appears to be supported by the preponderance of recent opinion. Snow, referring to the question "whether neutral vessels who place themselves under the convoy of a belligerent cruiser are liable to capture and confiscation," states that "the weight of opinion favors the doctrine that such acts are sufficient to condemn the vessel."[2] Says Rivier: "A neutral merchant vessel which sails under enemy convoy violates neutrality; its seizure and confiscation would be legitimate."[3]

Upon full consideration of the subject in all its aspects, including the discussions between the United States and Denmark, it seems to be unquestionable that the vessel should not be released, but should be sent in for adjudication.

NOTES ON SITUATION IV.

The controversy between the United States and Denmark, mentioned in the foregoing solution, grew out of the enforcement of certain revised instructions which were issued to the Danish men-of-war and privateers, March 28, 1810. By one clause of these instructions all vessels were declared to be good prize which had "made use of British convoy either in the Atlantic or the Baltic."[4] Under this clause 18 American vessels were seized in 1810, out of a total of 122 captures of American vessels by Danish cruisers in that year.

The convoy cases were first discussed, on the part of the United States, by Mr. George W. Erving, who was sent as special minister to Copenhagen in 1811. In the course of a comprehensive general report of June 23, 1811, on

[1] Wheaton's Elements, Lawrence's ed. of 1863, p. 871.

[2] Stockton's Snow, 163.

[3] Principes du Droit des Gens, II, 424: Paris, 1896.

[4] Am. State Papers, For. Rel., III, 329, 524.

the Danish captures, he thus referred to the convoy cases: "The ground on which they stand, I am aware, is not perfectly solid, yet I did not feel myself authorized to abandon them, and therefore have taken up an argument which may be difficult, but which I shall go as far as possible in maintaining."[1] The Danish Government, however, contended "that neutral vessels that make use of the convoy or protection of the vessels of war of Great Britain are to be considered as good prize if the Danish privateers capture them under convoy." Such was the construction given by Denmark to the convoy clause, which, as thus interpreted, that Government refused to modify. The principle on which the clause was justified was, as stated by Mr. de Rosenkrantz, Danish minister of foreign affairs, "that he who causes himself to be protected, by that act ranges himself on the side of the protector, and thus puts himself in opposition to the enemy of the protector, and evidently renounces the advantages attached to the character of friend to him against whom he seeks the protection. If Denmark should abandon this principle the navigators of all nations would find their account in carrying on the commerce of Great Britain under the protection of British ships of war, without running any risk. We every day see this done, the Danish Government not being able to place in the way of it any obstacles."[2]

After May, 1811, few American vessels were molested by the Danes, and between May, 1812, when Mr. Christopher Hughes' special mission ended, and 1827, when Mr. Wheaton was sent as minister to Denmark, little serious effort was made to effect a settlement of any of the claims against that Government.

Mr. Wheaton's principal argument in relation to the convoy cases was embraced in a note of Nov. 24, 1829.[3] He assumed the following grounds:

1. That under the convoy clause vessels and cargoes were condemned by the high court of admiralty, although in most, if not in all, such cases there was satisfactory proof that the vessels had been compelled to join the British convoy, and although the Danish prize ordinance was

[1] Am. State Papers, For. Rel., III, 521.
[2] Am. State Papers, For. Rel., III, 526.
[3] H. Doc. 249, 22 Cong., 1 sess., 34–38.

not known at St. Petersburg when they sailed from that port. Whoever considered the geographical position of the Baltic Sea, its outlets into the ocean, and the winds and currents by which its navigation was affected would, said Mr. Wheaton, readily perceive how difficult it must have been for neutrals passing during the war through the narrow and sinuous channels to avoid becoming entangled in the numerous convoys of the enemy of Denmark, even supposing that there was no disposition on the one side to receive or on the other to impart protection against the multiplied perils of those times. To make the protection accidentally received by or forcibly obtruded upon the neutral under these circumstances a ground of confiscation was an injustice strikingly apparent.

Comment.—This ground, it may be observed, was in the nature of a confession and avoidance, since, while admitting the presence of the vessels with the convoy, it suggested as excuses want of notice and coercion.

2. But it was, said Mr. Wheaton, less material to dwell on this aspect of the case, since the United States wholly denied the principle on which the clause in question was founded. This clause, as construed by the Danish tribunals, involved, so Mr. Wheaton declared, "the application of a principle (to say the least) of *doubtful* authority, to the confiscation of neutral property for a supposed offence committed, not by the owner, but by his agent, without the knowledge or orders of the owners, under a belligerent edict, retrospective in its operation, because unknown to those whom it was to affect." As interpreted by the Danish tribunals, it made "the fact of having navigated under the enemy's convoy * * * *per se* a justifiable cause (not of capture merely, but) of condemnation in the tribunals of the opposite belligerent, and *that* without inquiring into the proofs of proprietary interest or the circumstances and motives under which the captured vessel had joined the convoy, or into the legality of the voyage, or the innocence of her conduct in other respects." A belligerent pretension so harsh, apparently so new, and so important in its consequences, said Mr. Wheaton, must, before neutral nations could consent to it, be rigorously demonstrated on the authority of writers and the usage of nations; yet no expounder of the law of nations even men-

tioned it, and still less could it be asserted that any neutral nation had ever acquiesced in it. Even the records of the British courts might be searched in vain for any support of the pretension that the fact of having sailed under belligerent convoy was in all cases and under all circumstances conclusive cause of condemnation. Being found in company with an enemy's convoy might, indeed, furnish a presumption that the captured vessel and cargo belonged to the enemy, but it was a slight presumption only, which would readily yield to countervailing proof, and for this purpose the vessel should have been permitted to show, for example, that she had been compelled to join the convoy, or that she had joined it to protect herself not from examination by Danish cruisers but against others whose notorious conduct and avowed principles rendered it certain that captures by them would be followed by condemnation.

Comment.—From this argument it is to be inferred that the Danish tribunals gave to the clause in question a more extensive effect than that ascribed to it by the Danish Government. The construction of that Government, expressed in the correspondence with Mr. Erving, was, as has been seen, that vessels seized on the ground of accepting British protection were "good prize if the Danish privateers capture them under convoy;" while, as stated by Mr. Wheaton, "the fact of having navigated under the enemy's convoy" was held by the tribunals to be in itself a cause of condemnation.

3. Mr. Wheaton also contended that as Denmark had, when neutral, asserted the right to protect her commerce against belligerent visitation and search by means of armed convoys of her own public ships, she was *a fortiori* precluded from asserting a right to condemn neutral vessels for sailing under belligerent convoy. Great Britain treated navigating under the convoy of a neutral ship as a ground of condemnation, because it tended to defeat the lawful right of belligerent search and render every attempt to exercise it a contest of violence. But the belligerent, continued Mr. Wheaton, had a right to resist; and the masters of vessels under his convoy, not participating in his resistance, could no more be involved in the legal consequences of resistance than could the neutral shipper of

goods on a belligerent vessel or the neutral owner of goods found in a belligerent fortress. If the vessels in question had been armed, and had thus contributed to augment the force of the belligerent convoy, or if they had actually participated in battle with the Danish cruisers, they would justly have fallen by the fate of war. They were, however, unarmed merchantmen, whose junction with the convoying squadron, by expanding the sphere of its protection, tended to weaken it; and instead of participating in the enemy's resistance, there was in fact no battle and no resistance, and they fell a defenceless prey to the force of the assailants.

Comment.—This branch of Mr. Wheaton's argument embraces the questions of (1) neutral convoy and (2) neutral goods shipped on an armed enemy vessel. As to the first question, it may be observed that the conception of neutral convoy by nations which recognize and practise it is not that of resistance to search, but of the substitution for the process of search of a responsible governmental guarantee. This idea is conveyed in Stockton's Naval War Code:

"ART. 30. * * * Convoys of neutral merchant vessels, under escort of vessels of war of their own state, are exempt from the right of search, upon proper assurances, based on thorough examination, from the commander of the convoy."

As to the second question, Mr. Wheaton's contention was drawn from the case of the *Nereide*,[1] in which the goods were held to be exempt, Mr. Justice Story and one other justice dissenting, while two others were absent.[2] From this decision Mr. Wheaton reasons by analogy, and to a great extent draws his language on this point. It is, however, to be noticed that in a subsequent case the Supreme Court sharply distinguished the case of lading goods on an armed enemy vessel from that of the acceptance of belligerent convoy.[3] Mr. Wheaton himself, in his treatise on international law, thus summarizes the court's reasoning on the subject of belligerent convoy: "A convoy was an association for a hostile object. In undertaking it a State spreads over the merchant vessels an immunity from search which belongs only to a national ship; and by joining

[1] 9 Cranch, 388.

[2] Dana's Wheaton, 698, note 243.

[3] The Atalanta, 3 Wheaton, 409.

a convoy, every individual vessel puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine. If, then, the association be voluntary, the neutral, in suffering the fate of the entire convoy, has only to regret his own folly in wedding his fortune to theirs; or if involved in the resistance of the convoying ship, he shares the fate to which the leader of his own choice is liable in case of capture."[1]

4. Mr. Wheaton further contended that, in view of the multiplied ravages to which American commerce was then exposed on every sea, from the sweeping decrees of confiscation fulminated by the great belligerent powers, the conduct of the vessels in question might be sufficiently accounted for without resorting to the supposition that they meant to resist, or even to evade, the exercise of the belligerent rights of Denmark. Even admitting that the neutral American had no right to put himself under convoy in order to avoid the exercise of the right of visitation and search by a *friend*, as Denmark professed to be, he had still a perfect right, said Mr. Wheaton, to defend himself against his *enemy*, as France had shown herself to be, by her conduct, and the avowed principles upon which she had declared open war against all neutral trade. Denmark had a right to capture the commerce of her enemy, and for that purpose to search and examine vessels under the neutral flag, whilst America had an equal right to protect her commerce against French capture by all the means allowed by the ordinary laws of war between enemies. The exercise of this right was wholly unaffected by the circumstance of the war existing between Denmark and England, or by the alliance between Denmark and France. America and England were at peace. The alliance between Denmark and France was against England, not against America; and the Danish Government, which refused to adopt the decrees of Berlin and Milan as the rule of its conduct towards neutrals, surely could not consider it culpable, on the part of American shipmasters, to have defended themselves against the operation of those decrees by every means in their power. If the use of any of these means conflicted in any degree with the belligerent rights of Denmark, that was an incidental consequence, which

[1] Dana's Wheaton, 698.

could not be avoided by the parties without sacrificing their rights of self-defence.

Comment.—With regard to this particular contention, it may be suggested that, while it assumes that the British convoy was accepted for protection against French and not against Danish cruisers, and therefore (contrary to contention 1) deliberately, it also assumes that a neutral vessel may, at the expense of the rights of one belligerent, seek from another that protection which its own Government may fail to give against the exorbitant pretensions of a third belligerent. In order to support this contention, it should seem that the facts would in any event have to be clearly established.

5. But, finally, even supposing that it was the intention of the American shipmaster, in sailing with the British convoy, to escape from Danish as well as French cruisers, that intention had, Mr. Wheaton further contended, failed of its effect; and it might be asked what belligerent right of Denmark had been practically injured by such an abortive attempt? "If any," said Mr. Wheaton, "it must be the right of visitation and search. But the right of visitation and search is not a substantive and independent right, with which belligerents are invested by the law of nations for the purpose of wantonly vexing and interrupting the commerce of neutrals. It is a right growing out of the greater right of capturing enemy's property or contraband of war, and to be used as a means to an end to enforce the exercise of that right. Here the exercise of the right was never, in fact, opposed, and no injury has accrued to the belligerent. But it may be said that it might have been opposed, and entirely defeated, had it not been for the accidental circumstance of the separation of these vessels from the convoying force, and that the entire commerce of the world with the Baltic Sea might thus have been effectually protected from Danish capture. And it might be asked in reply, what injury would have resulted to the belligerent rights of Denmark from this circumstance? If the property be neutral, and the voyage lawful (as they were in the present instance), what injury would result from the vessels escaping from examination? On the other hand, if the property was that of the enemy, its escape must be attributed to the superior force of the enemy, which, though

a *loss*, would not be an *injury* of which Denmark would have a legal right to complain."

Comment.—With regard to this special phase of the case it may be observed that the contention that whether or no the vessel was enemy's property or otherwise subject to capture, no injury was done to the belligerent whose exercise of the right of search was prevented, may be accepted merely as a reassertion of one view of the controversy, since it obviously assumes the point at issue, viz, whether such prevention was an injury of which the belligerent had a right to complain, or in other words, a substantial injury.

Considering Mr. Wheaton's argument as a whole, it appears (1) that it was directed against the condemnation and not against the capture of the vessels; (2) that it was chiefly designed to show that the condemnations were, under the special circumstances of the case, improper; (3) that it alleged that the condemnations proceeded upon a construction of the instructions of 1810 which was, as has been pointed out, more extensive in its effect than that which was originally given to them by the Danish Government; (4) that it nowhere suggests that the acceptance of belligerent convoy did not create an adverse presumption which justified the sending in of the vessels for adjudication.

On March 28, 1830, a convention was signed by which the King of Denmark, while renouncing all claims against the United States, agreed to pay a lump sum of 650,000 Spanish milled dollars "on account of the citizens of the United States, who have preferred claims relating to the seizure, detention, condemnation, or confiscation of their vessels, cargoes, or property whatsoever, by the public or private armed ships, or by the tribunals of Denmark, or in the States subject to the Danish sceptre," during the maritime war in question. And it was further stipulated that "the intention of the two high contracting parties being solely to terminate, definitely and irrevocably, all the claims which have hitherto been preferred, they expressly declare that the present convention is only applicable to the cases therein mentioned, and, having no other object, can never hereafter be invoked by one party or the other as a precedent or rule for the future."

SITUATION V.

Hostilities have broken out in a certain country between the titular government and its opponents. These hostilities are carried on only to a slight extent on land, where the government for the most part successfully maintains its authority. The opponents of the government have not been recognized by foreign governments as belligerents. Their force is derived chiefly from the national navy, which, with the exception of two or three vessels, took an original part in the insurrection. The ships in revolt, without attempting to maintain a blockade, endeavor to control and interrupt the commerce of one of the principal ports of the country. On one occasion they arrest, within the limits of the port and in territorial waters, a neutral ship laden with arms and munitions of war and on its way to a wharf to deliver its cargo to agents of the titular government. The master appeals to the commander of a naval force of his own country for protection. Naval vessels of several foreign countries are then lying in the harbor, and there has been a general cooperation among them for the protection of commerce from unlawful interference. The foreign governments, however, all profess an attitude of nonintervention in the conflict.

What action should be taken on the appeal of the master?

SOLUTION.

On the situation above stated the reports of the various committees exhibited a divergence of views. This divergence may be explained as follows:

On the one hand, the view was taken that, as the trade in arms and munitions of war is not prohibited by the neutrality laws, and as the insurgents had not been recognized as belligerents, foreign governments might, in their discretion, according to the measure of privilege which they should accord to the insurgents, protect or decline to protect their citizens in furnishing arms and munitions of war to the titular government, even in the territorial waters of the country where the insurrection prevails.

In support of this view the following well-known passage, in an instruction of Mr. Fish, as Secretary of State, in relation to certain vessels in the service of insurgents against the Government of Haiti, was cited:

"Regarding them simply as armed cruisers of insurgents not yet acknowledged by this Government to have attained belligerent rights, it is competent to the United States to deny and resist the exercise by those vessels or any other agents of the rebellion of the privileges which attend maritime war, in respect to our citizens or property entitled to our protection. We may or may not, at our option, as justice or policy may require, treat them as pirates in the absolute and unqualified sense, or we may, as the circumstances of any actual case shall suggest, waive the extreme right and recognize, where facts warrant it, an actual intent on the part of the individual offenders, not to depredate in a criminal sense and for private gain, but to capture *jure belli*. It is sufficient for the present purpose that the United States will not admit any commission or authority proceeding from rebels as a justification or excuse for injury to persons or property entitled to the protection of this Government. They will not tolerate the search or stopping by cruisers in the rebel service of vessels of the United States, nor any other act which is only privileged by recognized belligerency."[1]

On the other hand, the view was maintained that the solution in the present case does not depend upon the recognition or nonrecognition of belligerency, nor upon the extent of the obligations which neutral governments are obliged to perform; that Mr. Fish, in denying to the insurgents "the privileges which attend maritime war," evidently referred to the exercise of the rights of war on the high seas, and not to the conduct of hostilities within the jurisdiction of Haiti; that the acts, the commission of which within their jurisdiction neutral governments are obliged to prevent, by no means comprise all acts of an unneutral character, against which the parties to an armed conflict are permitted to exercise, within proper limits, measures of prevention: and that, as the supply of arms and munitions of war is a direct military aid, foreign governments, though they abstain from recognizing the insurgents as belligerents and from thus acknowleding their

[1] Wharton's Int. Law Digest, III, 466.

right to interrupt even unneutral commerce on the high seas, are not, so long as they profess an attitude of non-intervention, justified in interfering at the domestic scene of hostilities to protect their citizens in furnishing such materials to either party.

It may be observed that the instructions issued by the United States in the case of the insurrection in Brazil, in 1893–1894, although they explicitly concede the right of the insurgent fleet to carry on hostilities within Brazilian jurisdiction, do not expressly cover the present situation; nor does it appear to have been involved in any protective action taken by the naval representatives of the United States on that occasion. The question was, however, suggested in correspondence, and as the record leaves it in an unsatisfactory position, it appears to be a proper subject for official elucidation.

NOTES ON SITUATION V.

Revolution in Chile, 1891.—This situation is suggested by events which took place in Chile during the revolution of 1891, and by certain occurrences in the harbor of Rio de Janeiro during the revolt of the Brazilian squadron in 1893–1894. It involves the question of the rights of insurgents, who have not been recognized as belligerents, when such insurgents are carrying on hostilities within the jurisdiction of the disturbed state. The question of hostilities on the high seas, discussed in the case of the *Ambrose Light*,[1] is not embraced in it, though it may now and then incidentally appear in the narrative.

The revolution in Chile grew out of a controversy between President Balmaceda and the Congress as to the power of the former to maintain in office a cabinet upon which Congressional censure had been pronounced. Under the Chilean constitution of 1833 the President possessed the power to appoint and remove public officials; but it had been the practice for the ministry, on a vote of censure by Congress, to resign. This custom President Balmaceda essayed to break. On the night of January 6, 1891, a number of the leaders of the opposition, including the vice-president of the Senate and the president of the Chamber of Deputies, went on board the national fleet lying at Valparaiso, and in the name of the Congress pro-

[1] 25 Fed. Rep., 408.

claimed a revolution. The ships taking part in the movement were the *Blanco Encalada*, *Almirante Cochrane*, *Esmeralda*, *Huascar*, *O'Higgins*, *and Magellanes*, the command of which when they revolted was assumed by Capt. Jorge Montt, of the Chilean navy.[1]

The principal incident in which the United States was concerned during the continuance of hostilities, was the recovery of the *Itata*, the insurgent transport, which escaped from the custody of United States officials at San Diego, California, while under arrest on a charge of violating the neutrality laws. This incident, however, does not fall within the purview of the present discussion.

Report of Admiral McCann.—In a report to the Secretary of the Navy, February 9, 1891, Rear-Admiral McCann, U. S. flagship *Pensacola*, stated that the insurgents had seized Chilean coast steamers for use as transports, but had not interfered with foreign steamers; that merchant vessels were asked for supplies, which were refused in order not to incur trouble with the shore authorities; that the insurgent ships were stationed off the port for observation rather than blockade, vessels being allowed to pass in and out freely; but that in some instances lighters loaded with supplies had been taken from alongside merchant steamers.[2]

Instructions to Admiral Brown.—March 26, 1891, Mr. Tracy, Secretary of the Navy, gave to Rear-Admiral Brown, who had been sent out to relieve Admiral McCann, the following instructions:[3]

"(1) To abstain from any proceedings which shall be in the nature of assistance to either party in the present disturbance, or from which sympathy with either party could be inferred.

"(2) In reference to the ships which have been declared outlawed by the Chilean Government, if such ships attempt to commit injuries or depredations upon the persons or property of Americans, you are authorized and directed to interfere in whatever way may be deemed necessary to prevent such acts; but you are not to interfere except for the protection of the lives or property of American citizens.

[1] H. Ex. Doc. 91, 52 Cong., 1 sess., 2–3.
[2] H. Ex. Doc. 91, 52 Cong., 1 sess., 235.
[3] H. Ex. Doc. 91, 52 Cong., 1 sess., 245–246.

"(3) Vessels or other property belonging to our citizens which may have been seized by the insurgents upon the high seas and for which no just settlement or compensation has been made are liable to forcible recovery; but the facts should be ascertained before proceeding to extreme measures and all effort made to avoid such measures.

"(4) Should the bombardment of any place, by which the lives or property of Americans may be endangered, be attempted or threatened by such ships, you will, if and when your force is sufficient for the purpose, require them to refrain from bombarding the place until sufficient time has been allowed for placing American life and property in safety.

"You will enforce this demand if it is refused, and if it is granted, proceed to give effect to the measures necessary for the security of such life or property. * * *

"6th. Referring to paragraph 18, page 137, of the Navy Regulations of 1876, which is as follows:

"'If any vessel shall be taken acting as a vessel of war or a privateer without having proper commission so to act, the officers and crew shall be considered as pirates, and treated accordingly.'

"You are informed that this paragraph does not refer to vessels acting in the interests of insurgents and directing their hostilities solely against the state whose authority they have disputed. It is only when such vessels commit piratical acts that they are to be treated as pirates, and unless their acts are of such a character or are directed against the persons or property of Americans you are not authorized to interfere with them.

"7th. In all cases where it becomes necessary to take forcible measures, force will only be used as a last resort, and then only to the extent which is necessary to effect the object in view."

British Correspondence.—A fuller report of the acts of the insurgent fleet may be found in the correspondence of the British Government, under whose supervision the commercial and shipping interests of the country, being largely in English hands, immediately fell. Questions were raised (1) as to blockade, (2) as to seizures of coal and other cargoes, and (3) as to the payment of duties.

Questions of blockade.—When the revolution was announced, the British naval forces in Chile were instructed by the Admiralty to "take no part except protection of British interests."[1] Early in the conflict, the Congressional deputation on the insurgent fleet notified the Government authorities and the foreign representatives that Iquique and Valparaiso would be blockaded on February 1, 1891. The Government declared that the blockade would be illegal, and urged the diplomatic corps to protest against it. At the request of the minister for foreign affairs, the diplomatic representatives of France, Germany, Great Britain, and the United States met at the foreign office to discuss the subject. On consulting they agreed that the blockade would be illegal, but that they could not directly protest against it, as this would involve a recognition of the insurgent fleet, which the Government had declared to be piratical. As a compromise they instructed the consuls to protest at their respective ports. A protest was made by the consular body at Iquique, January 18, 1891, to the captain of the *Almirante Cochrane* as follows: "The consular body being of opinion that the blockade notified to them will cause considerable damage to the persons and property of neutrals represented by them, protest against the act, and reserve the right to claim compensation for losses incurred." A similar protest was made by the consular corps at Valparaiso.[2]

At the same time Mr. Kennedy, then British minister at Santiago, telegraphed for instructions as to the course which should be pursued in the event of a blockade being established. The views of the foreign office on the subject may be found in a telegram to a firm in Glasgow, January 24, 1891, as follows: "Assuming effective blockade to exist, escort through it can not be given."[3]

In consequence of certain incidents the original notice was changed by the insurgents and it was announced that a blockade of Valparaiso would begin on the 18th of January, and of Iquique on the 20th of the same month. In reality neither blockade was actually established. Captain

[1] Blue Book, Chile, No. 1 (1892), 2.
[2] Blue Book, 25–41.
[3] Blue Book, 8.

St. Clair, of H. B. M. S. *Champion*, expressed the belief that the nonenforcement of the blockade at Valparaiso was the result of an interview which he held with Captain Montt, January 16, 1891, on board the *Blanco Encalada* at that port, and in which he pointed out "the illegality of any captures he might make." [1]

It appears that when Captain St. Clair, on the 20th of January, delivered to the commander of the *O'Higgins* the protest of the consular corps against the proposed blockade of Valparaiso, he was assured that only vessels carrying contraband of war would be interfered with.[2]

Rear-Admiral Hotham arrived at Iquique in H. B. M. S. *Warspite*, January 26, 1891. He found the *Almirante Cochrane* "blockading" the port. She saluted his flag with 13 guns, "and," said Admiral Hotham, "as it was a personal salute I returned it with the same number." The blockade was merely nominal. The *Almirante Cochrane* permitted free access to the shore by British vessels, and also allowed the mails, after examination, to be landed, and in some cases passengers from English steamers. [3]

Admiral Hotham arrived at Valparaiso January 31. There were then no Chilean men-of-war in the harbor, and vessels were going in and out and loading as usual. On the night of February 1 a man-of-war was seen in the "offing showing a searchlight." Next day the *Esmeralda* and two transports were observed some distance off the harbor and later were seen by a British man-of-war 25 miles away standing to the northward. The British steamer *Arica* arrived February 2, and reported that she had been stopped off the port by an officer from the *Esmeralda*, who took out of her some dispatches for the Government authorities and searched the ship, but did not interfere with any other mails.

Seizures of coal and other cargoes.—As to seizures of coal and other cargoes, it appears that early in January, 1891, Captain St. Clair asked of the Congressionalists an assurance that neutral property would not be interfered with in its transit from ship to shore or shore to ship. Captain Montt replied that until the blockade should be

[1] Blue Book, 41. [2] Blue Book, 47–50. [3] Blue Book, 45.

established free transit would be allowed to all foreign merchandise not contraband of war.[1]

The British steamer *Arica*, on her arrival at Valparaiso on the 2d of February, reported that on January 21 she was boarded 6 miles from land by an officer from the insurgent transport *Cachapol* and was ordered not to go to certain ports to which she was bound, but to go to Pisagua. The master protested, but had to go. On his arrival there the captain of the insurgent ship *Magellanes* ordered him to deliver up his cargo of bullocks. He protested, but, on the advice of the British consul, delivered up the cattle and obtained a receipt for them. He was then ordered to go to Coquimbo to get more bullocks. He declined to comply with this demand and declared that he would, on his arrival at Coquimbo, place himself under the protection of H. B. M. S. *Acorn*. On hearing of the incident, Admiral Hotham dispatched Captain St. Clair in the *Champion* with a letter to Captain Montt denouncing the act of the commander of the *Magellanes* as "a piece of presumption" inconsistent with assurances given to Captain St. Clair, and requesting Captain Montt to convey to his officers "the necessity of the discontinuance of such proceedings."[2]

Early in February, 1891, the insurgent fleet sought to take coal from certain English and German ships and send it to Iquique. A guard from a British man-of-war was placed on board each of the British ships and a protest made to the commander of the Chilean squadron. The latter accepted the protest as to the British ships, but proceeded to coal from the German collier *Rajah*, which was towed out to sea. Admiral Hotham gave notice that he was charged with the protection of German, French, and Italian vessels as well as of British, and that he desired to impress upon the commander of the squadron "the absolute necessity of the ships of war under your orders refraining from any interference with the merchant vessels of the above-named nations trading with a friendly power. Cargoes of coal, provisions, etc., *bona fide* consigned to noncombatants, can not be considered as contraband of

[1] Blue Book, 47–50. [2] Blue Book, 45–47.

war; and any seizure or detention of vessels carrying such cargoes is a gross breach of their neutral rights." It appears that besides the *Rajah*, a British collier, the *Kilmorey*, was seized by a Chilean transport under the orders of the *Esmeralda*. Admiral Hotham sent for the master of the *Kilmorey* and an arrangement was made with the insurgent fleet to purchase the coal on terms with which the master expressed himself as satisfied. Captain Montt offered in satisfaction of the seizure of the *Rajah* and *Kilmorey* (1) a salute of 21 guns to the English and German flags, and (2) a promise of indemnity for any damages which either the ships or the consignees of the cargoes might have sustained in consequence of the seizure. This offer was accepted by Admiral Hotham and the incident treated as closed. The ships on arriving at Iquique were fully compensated.[1]

February 17, 1891, Mr. Kennedy wrote to Lord Salisbury that the operations of the insurgent fleet up to that time had been limited to attempted landings on the coast, to the stoppage on the high seas of neutral ships chiefly for purposes of information, and to the seizure in various ports of launches laden with coal or provisions. For these articles payment had been made or promised and no serious complaint had reached him of violent acts committed against British shipping.[2]

April 10, 1891, the foreign office sent to the Admiralty a draft of a telegram to Admiral Hotham, drawn up in consultation with the law offices of the Crown, saying:

"Information has been received that the Congressional Party threaten that if steamers omit to call at the ports at which they usually touch such omission will be considered a hostile act, and will render them liable to be seized. You should state to the heads of the party that their right to dictate to British vessels which ports they shall visit can not be admitted by Her Majesty's Government, and that you have received instructions to protect such vessels from molestation on this account if necessary."[3]

Payment of duties.—Various questions arose as to the payment of duties, especially on the exportation of

[1] Blue Book, 13, 59–62, 73, 113.
[2] Blue Book, 51–52.
[3] Blue Book, 70.

nitrates, in consequence of the claim of the Government to exercise authority over ports and places of which the insurgents, in the progress of the revolution, obtained possession. The British foreign office at first declined to take the responsibility of advising merchants as to the course they should pursue, but suggested that if duties were exacted by insurgent authorities in actual possession, payment should be made on compulsion and under protest, and better still, that a bond should be given for the amount if the insurgent authorities would accept it. On the other hand, it was declared that Her Majesty's Government did not admit the right of the Chilean Government to require the payment over again of duties when there was evidence that they had already been paid on compulsion and under protest to the authorities in actual and complete possession of the port of export. Should the claim be persisted in, a bond might be given for the amount pending a settlement between the two Governments.[1]

In June, 1891, a gunboat belonging to the Balmaceda Government entered the port of Tocopilla, then in possession of the insurgents, and exacted payment of duty on 1,600 tons of nitrate loading for a British company on the British steamship *Chepica*. The foreign office advised that if the Congressional authorities insisted on the payment of any further and separate duties, as a condition of the vessel's leaving the port, the best course would be to give a bond for the amount of such duties under protest. At the same time Mr. Kennedy was instructed that in the opinion of Her Majesty's Government the action of the gunboat in exacting duties was "altogether wrongful and irregular, such dues being ordinarily and properly payable to the customs authorities at the port of clearance," and that the amount exacted would be claimed back from the Chilean Government. On arriving at the port Captain Parr, of H. B. M. S. *Melpomene*, found that the payment of the duties a second time was claimed by the revolutionary authorities, and that in default of their payment the shipment of the cargo had been stopped. Captain Parr remonstrated with the intendente and requested him to telegraph the provisional government at Iquique

[1] Blue Book, 69, 71, 75.

for instructions, which he did. The provisional government replied that "solely out of deference to the commandante of the *Melpomene*, and as an act of respect to the British navy," they would accept payment of the duties in drafts on London, at ninety days' sight, thus giving the company four months and a half grace, as the term of the drafts would not begin to run till they were accepted. On receipt of this reply the manager of the nitrate firm agreed to sign the drafts as required.[1]

By this review it appears—

1. That the British Government admitted the right of the insurgents to establish a blockade on the usual condition of effectiveness.

2. That the British naval officers recognized the right of the insurgents to intercept contraband of war, and allowed them to a limited extent, but not as of right, to obtain coal and supplies for their fleet from neutral vessels.

3. That the right to collect duties was acknowledged to belong to the insurgents wherever they maintained complete and effective possession of the place.

Insurrection in Brazil, 1893–94.—September 6, 1893, Mr. Thompson, the minister of the United States at Rio de Janeiro, reported that the navy of Brazil had revolted, assumed complete control over the harbor, and seized all the war vessels, and that it threatened, unless the vice-president resigned, to bombard the city. The revolted squadron, comprising the war ships *Aquidaban*, *Jupiter*, and *Republica*, together with a number of Brazilian merchant vessels which had been seized in the harbor, was under the command of Admiral José Custodio de Mello, of the Brazilian navy. The Government held possession of Fort Santa Cruz, which commands the entrance to the harbor, and retained the loyalty of the army. The squadron controlled the inner harbor to within a limited distance of the shore line, which was defended by artillery, infantry, and the police force.[2]

Question of bombardment.—Toward the end of September much firing took place between the squadron and

[1] Blue Book, 144, 157, 219–220. [2] For. Rel., 1893, 45–46.

loyal forts and batteries on shore, and many shots from the ships fell in the city, causing much damage to property and some loss of life, while business houses remained closed because of rumors that the city would be bombarded. Under these circumstances, the commanders of the naval forces of the United States, Great Britain, France, Italy, and Portugal, then present in the harbor, informed Admiral Mello that they would oppose, by force if necessary, an attack upon the city; and the diplomatic representatives of those powers, "continuing in the line of conduct followed up to this time, not to interfere in the internal affairs of Brazil, but to assure the protection and safety of their fellow-countrymen and the higher interests of humanity," urgently requested the Brazilian Government, in view of the action of the foreign commanders, "to deprive Admiral de Mello of all pretext for hostile action" against the city. In the event of a refusal of this request, they stated that they would communicate the reply to their Governments and ask for instructions.[1]

The Brazilian Government promised to deprive Admiral Mello of every pretext for hostilities against the city; but a misunderstanding immediately arose between the Government on the one hand and the foreign diplomatic and naval officers on the other as to whether this promise included the removal of cannon from some of the batteries and whether the work of strengthening the batteries was not actually continued; and in view of this misunderstanding the diplomatic representatives declared that they could not accept "any other responsibility than that which may result from the necessity of protecting the general interests of humanity and the lives and property of their countrymen."[2]

Question of Recognition.—On the 23d of October, 1893, Admiral Mello informed Mr. Thompson, through the officer in command of the United States naval forces, that the insurgents had established a provisional government at Desterro, the capital of the State of Santa Catharina, and asked that they be recognized as belligerents. This request the Government of the United States refused, on

[1] For. Rel., 1893, 56.

[2] For. Rel., 1893, 58–59.

the ground that its concession "would be an unfriendly act toward Brazil and a gratuitous demonstration of moral support to the rebellion, the insurgents having not, apparently, up to date established and maintained a political organization which would justify such recognition;" but Mr. Thompson was instructed "to observe, until further advised, the attitude of an indifferent spectator."[1]

Conduct of Commercial Operations.—On the 30th of October, Mr. Thompson inquired by telegraph whether he was "authorized to protect American merchandise on Brazilian barges against the insurgents, using force if necessary." He explained that cargoes could not be landed in Rio de Janeiro unless barges were used.

Mr. Gresham, then Secretary of State, replied: "There having been no recognition by United States of the insurgents as belligerents, and there being no pretense that the port of Rio is blockaded, it is clear that if an American ship anchored in the harbor employs barges and lighters in transferring her cargo to the shore in the usual way and in doing so does not cross or otherwise interfere with Mello's line of fire and he seizes or attempts to seize the barges or lighters, he can and should be resisted. You will deliver a copy of this telegram to the commander of the insurgents."[2]

December 1, 1893, Admiral Mello left Rio de Janeiro in his flagship, the *Aquidaban*, going south, and was succeeded in the command of the naval forces in the harbor by Rear-Admiral Luis Felippe de Saldanha da Gama, who, after having maintained an apparent neutrality, announced in a proclamation his espousal of the cause of the revolution and of the restoration of the Empire, subject to ratification by the people.[3]

December 25, 1893, threats of a bombardment having again been made, the commanders of the naval forces of the United States, France, Great Britain, Austria-Hungary, Italy, and Portugal replied that, in case such a measure should become inevitable, they would, while not committing themselves to any course of action, require a previous notice of at least two days to be given in order

[1] For. Rel., 1893, 63. [2] For. Rel., 1893, 64. [3] For. Rel., 1893, 77, 83.

to insure the safety of the persons and property of their fellow-countrymen.[1]

Meanwhile an effort was made by the foreign representatives to secure a safe place for the discharge of foreign shipping. This action was taken in consequence of an understanding that it was Admiral da Gama's intention to prevent all merchandise from reaching either the custom-house or the shore. November 6, 1893, the American, English, French, German, Italian, and Portuguese naval commanders, by a general communication, had informed Admiral Mello (1) that they did not recognize the right of the insurgent forces to interfere with commercial operations conducted anywhere "except in the actual lines of fire of the batteries of the land fortifications," and that they would protect merchandise not only on board vessels of their respective countries, but also on lighters, barges, and other transports, whatever might be their nationality, employed by those vessels in commercial operations, and (2) that such transports or their tugs would carry at their prow the flag of the country under whose protection they might at the time be.[2] Difficulties and uncertainties, by reason of acts of the Government as well as of the insurgents, having arisen in the interpretation and enforcement of this plan, the question as to what constituted a "line of fire" being shifting and unsettled, Mr. Gresham, January 6, 1894, directed Mr. Thompson "to induce, by cooperation with the commanding officer of the forces of the United States, and if possible with others, the insurgents to designate a place, if such a place can be found, at which vessels of neutral nations may, without interfering with military operations, take and discharge cargoes in safety."[3]

United States instructions.—January 11, 1894, Mr. Gresham addressed to Mr. Thompson, by mail, full instructions, as follows:[4]

"Under date of the 5th instant Captain Picking reports the effective fortification and armament of strategic positions within the limits of the city, adding that the naval

[1] For. Rel., 1893, 89.
[2] For. Rel., 1893, 95–96.
[3] For. Rel., 1893, 98.
[4] For. Rel., 1893, 99.

commanders in conference had thereupon agreed that in view of this action they could no longer maintain their intention to prevent bombardment. The facts reported appear to justify this conclusion.

"An actual condition of hostilities existing, this Government has no desire to intervene to restrict the operations of either party at the expense of its effective conduct of systematic measures against the other. Our principal and obvious duty, apart from neutrality, is to guard against needless or illegitimate interference, by either hostile party, with the innocent and legitimate neutral interests of our citizens. Interruption of their commerce can be respected as a matter of right only when it takes one of two shapes—either by so conducting offensive and defensive operations as to make it impossible to carry on commerce in the line of regular fire, or by resort to the expedient of an announced and effective blockade.

"Vexatious interference with foreign merchant shipping, at a designated anchorage, or with the lighterage of neutral goods between such anchorage and a designated landing, by random firing not necessary to a regular plan of hostilities and having no other apparent object than the molestation of such commerce, is as illegitimate as it is intolerable. Hence, we have a right to expect and insist that safe anchorage and time and place for loading and unloading be designated, if practicable, to be interrupted only by notice of actual intention to bombard, or by notification and effective enforcement of blockade.

"The insurgents have not been recognized as belligerents, and should they announce a blockade of the port of Rio the sole test of its validity will be their ability to make it effective.

"Our naval commander at Rio has been instructed as above with regard to the protection of neutral commerce under our flag, which it would seem represents only a small part of the foreign commercial interests afloat in the harbor of Rio. The British ships there are said to outnumber those of the United States nine to one, but no substantial interference with our vessels, however few, will be acquiesced in, unless made effective with regard to all

foreign shipping, and, moreover, so made effective in pursuance of some tangible plan of orderly military operations."

The substance of these instructions may be stated thus—

1. That, in view of the creation of fortified and armed strategic positions within the limits of the city, the foreign naval forces would not be justified in forcibly preventing its bombardment.

2. That, while an effective blockade of the port by the insurgents would be respected, they would not be permitted to accomplish indirectly the ends of a blockade by employing, either openly or under the guise of military operations, acts of force against foreign vessels engaged in commercial transactions.

These instructions recognized the right of the insurgents to carry on hostilities even by means of a commercial blockade of the port, a measure the enforcement of which might involve the extension of the insurgent operations to the high seas. They denied to the insurgents the right, after allowing foreign commerce to enter the port, to seek to accomplish the objects of a blockade either by seizing particular vessels or by firing upon them when they were engaged in discharging or receiving cargo.

Question as to coal.—January 12, 1894, Mr. Thompson reported that the insurgents had taken possession of an island in the harbor, used as a coal depot, and with it had captured large quantities of coal belonging to the Royal Mail Steamship Company of England. It seems that Admiral da Gama issued orders to prevent the landing of coal, apparently with the object of preventing the Government from obtaining it for its ships. The subject was discussed by the diplomatic corps; and the British minister, with the concurrence of his Belgian, French, Italian, and Portuguese colleagues, declared that all other means would be exhausted, perhaps even that of recognition, before a resort to force to prevent the execution of the order.[1]

Protection of American vessels.—January 12, 1894, Mr. Thompson reported that since the advent of Admiral da Gama several American vessels had gone to the docks on

[1] For. Rel., 1893, 115, 116.

their own responsibility, and with the consent of the Government had discharged and taken in cargo without interference; that some German and other foreign ships had also proceeded with their operations without interruption; and that the Germans had maintained independently the position taken by all the powers in regard to commerce, in the communication to Admiral Mello.[1]

On the 26th of January Mr. Thompson wrote that commercial operations in the harbor continued to be carried on "without any serious interference with American interests." Three days later, however, he telegraphed: "American vessels will be convoyed to the dock by the U. S. S. *Detroit*, and a general engagement may follow if she is fired upon, as she is ready to return the fire." A telegram having also been received from Admiral Benham, who had succeeded Captain Picking in command of the United States naval force, indicating a serious situation, Mr. Gresham directed Mr. Thompson to make a full report, and particularly to state whether any, and if any what, change had taken place in the attitude of the United States naval force; whether Admiral Benham disagreed with the other naval commanders, and if so on what points; whether United States merchant vessels were enjoying any protection not previously given, and "whether a blockade is enforced by the insurgents or any attempt made by them to that end."

Mr. Thompson telegraphed January 31, 1894, the following reply:

"Mr. Thompson telegraphs that he is informed by Admiral Benham, with whom he had an interview on this day, that a full report of his action was sent on the preceding morning to the Navy Department. After notifying the insurgents and the city that he intended to protect by force, if necessary, and to place all American vessels who might wish to go to the docks alongside the wharves, the war vessels of the United States got under way and cleared for action. The *Detroit*, which was stationed in the best position for the ends of protection, had orders to fire back if the merchant vessels were fired upon. A shot

[1] For. Rel., 1893, 105–106.

from one of the insurgents' vessels was fired at, but missed, the boat of one of the American vessels that was making preparations for hauling in by means of a line running to the shore. The *Detroit* replied with a shot from a 6-pounder, which struck under the insurgent's bows. The latter then fired one shot to leeward from her broadside battery and subsequently another over the merchant vessel. The *Detroit* answered with a musket shot, which struck the sternpost of the insurgent vessel. The latter was hailed by the commander of the *Detroit*, as he passed by, who declared that he would return the fire and sink her, if necessary, in the event of her again firing. By this time one of the American vessels was moored near the dock in her new berth, and a tug came up offering to discharge without cost the cargoes of all the vessels. Notice was then given to the commander of the insurgent forces that the cargoes would be taken out of the vessels in the berths they then occupied, but that it was determined, as theretofore, that if American vessels wished to have berths in the docks they would be placed there and given full protection by the squadron of the United States. The *Detroit* was afterwards withdrawn and the war vessels anchored. He states that the naval or military operations of either side were not in the least interfered with by Admiral Benham, who entertains no such intention. What he proposes to do is to fulfill his duty of protecting the citizens and trade of the United States, and of this the insurgents have been notified by him. Admiral Benham declares that if American vessels get in the line of fire during the actual course of legitimate hostilities they must take the consequences, but their freedom of movement must be respected. The insurgents are denied the right to search neutral vessels or to seize any part of their cargoes, even though such cargoes should comprise such articles as would, in case of war between two independent Governments, come within the class of merchandise defined as contraband of war. The insurgents, in their present status, would commit an act of piracy by forcibly seizing such merchandise.

"He adds that, to the best of his information, all the foreign commanders agree with Admiral Benham, and that

the effective action of last Monday has restored complete tranquillity, broken the attempted blockade of commerce and trade, and placed everything in even motion."

Mr. Gresham, in acknowledging, on February 1, the receipt of this telegram, said "that Admiral Benham has acted within his instructions."[1]

On the 2nd of February Mr. Thompson telegraphed that the insurgents had "withdrawn their restrictive orders," that ships of all nationalities were "no longer kept from coming to the shore," and that a favorable progress was noticeable in commerce, all of which was due "to the influence of the war vessels of the United States having stopped the insurgents' fire against American merchant vessels."[2]

When Admiral Benham took the action which has been narrated, Mr. Gresham's instructions to Mr. Thompson of the 11th of January had not reached Rio de Janeiro. Those instructions seem, however, to have been intended merely as an amplified and explanatory restatement of the position held by the United States from the beginning; and there is no reason to suppose that Mr. Gresham, when he telegraphed that the Admiral had "acted within his instructions," contemplated any departure from that position. On the contrary, his first inquiry, when advised of a serious situation, was whether any "change" had taken place in the attitude of the United States naval forces, and "whether a blockade is enforced by the insurgents or any attempt made by them to that end." As reported, Admiral Benham's action did not appear to have involved any question as to the right of the insurgents to prevent the supply of contraband of war to their antagonist; but it must be admitted that the intention to deny them such a right was declared in Mr. Thompson's telegram, and it was explicitly announced by Admiral Benham to Admiral da Gama in a letter of January 30, 1894, a copy of which could not, however, have reached Washington in the regular course till the insurrection was practically at an end. With regard to what had taken place, Admiral Benham in that letter said: "In no case have I interfered in the

[1] For. Rel., 1893, 115–117. [2] For. Rel., 1893, 120.

slightest way with the military operations of either side in the contest now going on, nor is it my intention to do so. * * * My duty is to protect Americans and American commerce, and this I intend to do to the fullest extent. American vessels must not be interfered with in any way in their movements in going to the wharves or about the harbor, it being understood, however, that they must take the consequences of getting in the line of fire where legitimate hostilities are actually in progress."

So much as to what had actually been done. Admiral Benham added, however, that there was "another point," of which it might be "well to speak." This was: "Until belligerent rights are accorded you, you have no right to exercise any authority whatever over American ships or property of any kind. You can not search neutral vessels or seize any portion of their cargoes, even though they be within the class which may be clearly defined as contraband of war, during hostilities between two independent governments. The forcible seizure of any such articles by those under your command would be, in your present status, an act of piracy."[1]

Mr. Thompson, in a telegram of February 1, 1894, stated that as the situation was understood by him Admiral Benham had maintained the same attitude as was from the first assumed by the United States forces, "except perhaps by refusing to recognize da Gama's authority."[2] This statement, read in connection with Admiral Benham's letter to Admiral da Gama, seems to refer, at least inclusively, to the question of preventing the supply of contraband.

This question, which may at any moment become a practical one to the naval officer, is left by the record in a position that can hardly be deemed satisfactory. It may be argued that, as the intention to prevent the insurgents from interfering with the supply of contraband articles to the government was clearly declared and not expressly disapproved, it was impliedly approved. On the other hand, it may be argued that, as the question was apparently not involved in the case that had arisen, the approval of what was done does not necessarily imply approval of

[1] For. Rel., 1893, 122.

[2] For. Rel., 1893, 118.

all that was said: that the question of vexatiously interrupting commerce by firing upon or seizing innocent neutral ships, which is not permissible in any case, and that of preventing the supply of contraband are radically different: that by Mr. Gresham's instructions of January 11, 1894, the right to carry on hostilities, even by means of a blockade, was expressly admitted to belong to the insurgents, and that this necessarily implied that they possessed the right to prevent within the national theater of hostilities the supply of contraband of war to their adversary. The record being thus inconclusive, the question may be considered in the light of elementary principles.

1. The right of insurgents to carry on hostilities against the titular government and the recognition of them as belligerents are different things and are not interdependent. When we speak of the "recognition" of belligerency, we necessarily imply the preexistence of the condition of things which we in that form acknowledge. It would not be difficult to cite instances in which insurgents have overthrown the titular government and established one of their own in its place without having received from any foreign power "recognition" as belligerents. Where such a contest exists foreign powers, if they profess to be neutral in the conflict, acknowledge, with or without recognition of belligerency, the duty of noninterference. So clearly is this the case that in recent times the word "insurgency" has found its way into the terminology of law and diplomacy, as a term denoting the existence of a state of domestic hostilities, without recognition of belligerency.

2. The existence of domestic hostilities does not confer upon foreign powers any legal authority within the jurisdiction of the nation within which the insurrection prevails; nor is such authority gained either by conceding or withholding recognition of belligerency. As regards relations with foreign powers, the nonrecognition of belligerency has two results. The first is that the parties to the conflict are denied the right to interfere with neutral vessels on the high seas. There all nations are, in time of peace, equal, none possessing any authority over another; it is only in the abnormal condition of recognized belliger-

ency that authority to interfere with such vessels on the high seas is conceded. The second result is, that the titular government remains presumptively responsible for the redress of injuries done to neutral aliens within the national jurisdiction. Should a foreign government recognize the insurgents as belligerents, it would thereby elect to look to the insurgent authorities for the redress of injuries which they may commit, and would to that extent relieve the titular government. But while responsibility may thus shift from one set of authorities to another, the national sovereignty remains supreme and the national jurisdiction inviolate. Within such jurisdiction foreign powers can set up no claim to equality with the titular sovereign as a ground on which to oppose the exercise by either party of the rights of war. Their right of interference is limited to acts of necessary self-defense, under circumstances such as justify a disregard of the rule of territorial sovereignty.

Of these distinctions an illustration may be found in a case which occurred in Colombia in 1885. During the insurrection which prevailed in that year certain vessels belonging to the United Magdalena Steam Navigation Company, an American corporation, were seized by the insurgents. The case having been laid by the company before the Government of the United States, Dr. Francis Wharton, who was then Solicitor of the Department of State, made, April 21, 1885, a report, in the course of which he said:

"When vessels belonging to citizens of the United States have been seized and are now navigated on the high seas by persons not representing any government or belligerent power recognized by the United States, such vessels may be captured and rescued by their owners, or by United States cruisers acting for such owners."[1]

In a later report of May 18, 1885, referring to the same question, Dr. Wharton repeated this opinion, and recommended that the Secretary of the Navy be requested to give instructions "that the vessels thus unlawfully seized and now possessed by the insurgents be retaken when on

[1] For. Rel., 1885, 212.

the high seas by any force the United States may be able to use for that purpose." He added that, while it might be conceded that the insurgent crews manning the vessels unlawfully seized could not be regarded as pirates, yet "vessels belonging to citizens of the United States so seized by them may be rescued by our cruisers acting for the owners of such vessels in the same way that we could reclaim vessels derelict on the high seas." May 19, 1885, Mr. Bayard, Secretary of State, inclosed copies of these reports to Mr. Scruggs, then minister of the United States at Bogota, and referred to the Department's recommendation "that proper instructions be immediately issued to the commander of the naval authorities in Colombia for the recapture, when on the high seas, by any force the United States may be able to use for that purpose, of the vessels of the Magdalena Steam Navigation Company thus unlawfully seized and possessed by the insurgents."[1]

It is to be observed that in this case the assertion of the right of the United States naval forces to recapture the vessels was uniformly limited to the high seas. Although it by no means follows that the Government might not, under different circumstances, have gone further, this limitation is to be particularly noted, since the seizure of the vessels by the insurgents appears to have been an unlawful act of violence.

The position taken by the Department of State in 1885 has lately been reaffirmed, it being stated—in a case presenting similar conditions—that the vessel "could be recaptured for the benefit of its lawful owners on the high seas by our naval force."[2]

With regard to the instructions of Mr. Fish, as quoted in the solution,[3] touching certain vessels in the service of insurgents against the Government of Haiti, it may be pointed out that no right to seize such vessels within the territorial waters of that country is asserted. The general

[1] For. Rel., 1885, 211.

[2] Mr. Hay, Secretary of State, to Mr. Merry, March 3, 1899, MS. Instr. to Central America, XXI, 427, citing Mr. Bayard to Mr. Scruggs, May 19, 1885, For. Rel., 1885, 211; also, Mr. Hay, Secretary of State, to the Secretary of the Navy, March 13, 1899, 235 MS. Dom. Let., 416.

[3] Supra, p. 109.

police power which all nations possess to seize and punish pirates obviously does not extend to that part of the sea which lies within the jurisdiction of particular nations. In the case before Mr. Fish the vessels in question had been declared by the Haitian Government to be piratical, and on the strength of this declaration the secretary of foreign affairs had addressed to the several members of the diplomatic corps at Port au Prince a note requesting that each Government whose representative was thus addressed would give, by means of its naval forces, "an adequate and efficacious cooperation in maintaining for the marine of the civilized world the securities of the seas," and "guarantee the protection of private property." Replying to this request, Mr. Fish, in a passage which immediately follows that quoted in the solution, but which has not heretofore been printed, said:

"No facts have been presented to this Government to create a belief that the operations of the vessels in question have been with a view to plunder or had any other than a political object. That object is hostile to a government with which the United States have maintained a friendship that it requires no fresh manifestation to evince. We deem it most decorous to leave it to that government to deal with the hostile vessels as it may find expedient, reserving the consideration of our action in respect to them till some offense, actual or apprehended, to the United States shall render it imperative."[1]

In a recent case the Department of State discussed a suggestion which had been put forward in a country in which an insurrection prevailed, that the acts of insurgents were to be considered as mere "lawlessness" against the established authority, and that any injury which they might do to the persons or property of foreign noncombatants should be "looked upon as outlawry on mankind," for the prevention of which the naval forces of foreign powers might be employed. With regard to this suggestion the Department of State expressed the opinion that it failed to discriminate between the right of a foreign

[1] Mr. Fish, Sec. of State, to Mr. Bassett, Sept. 14, 1869, MS. Instr. to Haiti, I, 150.

naval force to extend protection against "wanton injury by whatever aggressor," and the supposed obligation to treat the acts of insurgents as outlawry; that this supposed obligation, since it proceeded upon the theory that the insurrection itself was to be treated as an act of lawlessness, would imply the duty of siding with the titular authorities against the insurgents; that this would obviously be incompatible with the dictates of neutrality; and that the only duty of foreign naval forces was to shield the persons and property of alien neutrals placed under their protection against "acts of wanton injury," to which end they might "in extreme need be rightfully employed."[1]

3. We have seen (1) that the right of parties to a domestic conflict to carry on hostilities does not depend upon the recognition of belligerency, and (2) that, as the existence of domestic hostilities confers no authority upon foreign powers within the jurisdiction of the nation in which the insurrection prevails, such powers are not allowed to interfere there except upon the ground of necessary self-defense against acts of wanton injury. The question therefore arises whether the act of insurgents in preventing the supply of contraband, such as arms and munitions of war, to the government against which they are carrying on hostilities is such an injury, or whether it can be considered as an injury at all. In order to answer this question it is necessary to consider the nature of the act which the insurgents seek to prevent.

Much misapprehension as to the quality of the act of supplying contraband articles, such as arms and munitions of war, to the parties to an armed conflict, has arisen from the statement so often made that the trade in contraband is lawful and not prohibited. This statement, when used with reference to the preventive duties of neutral governments, is quite correct, but if applied to the duties of individuals it is quite incorrect. The acts which individuals are forbidden to commit and the acts which neutral governments are obliged to prevent are by no means the same; precisely as the acts which the neutral government is obliged to prevent and the acts which it is forbid-

[1] Mr. Hay, Sec. of State, to Sec. of the Navy, Oct. 17, 1899, 240 MS. Dom. Let., 534.

den to commit are by no means the same. The supply of materials of war, such as arms and ammunition, to either party to an armed conflict, although neutral governments are not obliged to prevent it, constitutes on the part of the individuals who engage in it a participation in hostilities, and as such is confessedly an unneutral act. Should the government of the individual itself supply such articles it would clearly depart from its position of neutrality. The private citizen undertakes the business at his own risk, and against this risk his government can not assure him protection without making itself a party to his unneutral act.

These propositions are abundantly established by authority.

Maritime states, says Heffter, have adopted, "in a common and reciprocal interest, the rule that belligerents have the right to restrict the freedom of neutral commerce so far as concerns contraband of war, and to punish violations of the law in that regard. * * * This right has never been seriously denied to belligerents."[1]

Says Kent: "The principal restriction which the law of nations imposes on the trade of neutrals is the prohibition to furnish the belligerent parties with warlike stores and other articles which are directly auxiliary to warlike purposes."[2]

"If the neutral [government]," says Woolsey, "should send powder or balls, cannon or rifles, this would be a direct encouragement of the war, and so a departure from the neutral position. * * * Now, the same wrong is committed when a private trader, without the privity of his government, furnishes the means of war to either of the warring parties. It may be made a question whether such conduct on the part of the private citizen ought not to be prevented by his government, even as enlistments for foreign armies on neutral soil are made penal. But it is difficult for a government to watch narrowly the operations of trade, and it is annoying for the innocent trader. Moreover, the neutral ought not to be subjected by the quarrels of others to additional care and expense. Hence

[1] Heffter, Droit Int., Bergson's ed., by Geffcken, 1883, p. 384.

[2] Kent, Int. Law, 2d ed., by Abdy, 330.

by the practice of nations he is passive in regard to violations of the rules concerning contraband, blockade, and the like, and leaves the police of the sea and the punishing or reprisal power in the hands of those who are most interested, the limits being fixed for the punishment by common usage or law. * * * It is admitted that the act of carrying to the enemy articles directly useful in war is a wrong, for which the injured party may punish the neutral taken in the act."[1]

Says Manning: "The right of belligerents to prevent neutrals from carrying to an enemy articles that may serve him in the direct prosecution of his hostile purposes has been acknowledged by all authorities, and is obvious to plain reason. * * * The nonrecognition of this right * * * would place it in the power of neutrals to interfere directly in the issue of wars—those who, by definition, are not parties in the contest thus receiving a power to injure a belligerent, which even if direct enemies they would not possess."[2]

"A belligerent," says Creasy, "has by international law a right to seize at sea, and to appropriate or destroy, articles, to whomsoever they may belong, which are calculated to aid the belligerent's enemy in the war, and which are being conveyed by sea to that enemy's territory."[3]

"The neutral power," says Holland, "is under no obligation to prevent its subjects from engaging in the running of blockades, in shipping or carrying contraband, or in carrying troops or dispatches from one of the belligerents; but, on the other hand, neutral subjects so engaged can expect no protection from their own government against such customary penalties as may be imposed upon their conduct by the belligerent who is aggrieved by it."[4]

"By this term [contraband] we now understand," says Baker, "a class of articles of commerce which neutrals are prohibited from furnishing to either one of the belligerents, for the reason that by so doing injury is done to

[1] Woolsey, Int. Law, §§ 178, 179.

[2] Manning's Law of Nation, Amos's edition, 352.

[3] Creasy, First Platform of Int. Law, 604.

[4] Holland, Studies in International Law, 124–125.

the other belligerent. To carry on this class of commerce is deemed a violation of neutral duty, inasmuch as it necessarily interferes with the operations of the war by furnishing assistance to the belligerent to whom such prohibited articles are supplied."[1]

It may be observed that in some of the foregoing quotations the question is discussed as one affecting the rights of "belligerents." But the question of belligerency is important only as affecting the question of the right of seizure on the high seas. The circumstance that the parties, in consequence of the nonrecognition of their belligerency, are not permitted to exercise visitation and search on the high seas does not alter the nature or detract from the unneutral character of the act of supplying arms and munitions of war to the parties to an armed conflict.

The fact that the supplying of such articles is considered as a participation in the hostilities is shown not only by the authority of writers, but also by numerous state papers.

President Washington, in his famous neutrality proclamation of April 22, 1793, countersigned by Mr. Jefferson, as Secretary of State, announced "that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to any of them those articles which are deemed contraband by the modern usage of nations, will not receive the protection of the United States against such punishment or forfeiture."[2]

Mr. Jefferson, in the subsequent note to the British minister, quoted in Wharton's Digest (I, 510), observes that in the case of contraband the law of nations is satisfied with the "external penalty" pronounced in the President's proclamation.

President Grant, in the proclamation issued by him August 22, 1870, during the Franco-German war, declares, in the most precise terms:

"While all persons may lawfully, and without restriction, by reason of the aforesaid state of war, manufacture

[1] Baker's First Steps in International Law, 281.

[2] Am. State Papers, For. Rel., I, 140.

and sell within the United States arms and munitions of war, and other articles ordinarily known as 'contraband of war,' yet they can not carry such articles upon the high seas for the use or service of either belligerent, * * * without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf. And I do hereby give notice that all citizens of the United States, and others who may claim the protection of this Government, who may misconduct themselves in the premises, will do so at their peril, and that they can in no wise obtain any protection from the Government of the United States against the consequences of their misconduct."[1]

In the neutrality proclamations, issued during the war between the United States and Spain, the following provisions are found, in which the furnishing of arms and munitions of war to either party to the conflict is expressly treated as an act of unneutrality.

The Brazilian Government, by a circular of April 29, 1898, declared to be "absolutely prohibited" the "exportation of material of war from the ports of Brazil to those of either of the belligerent powers, under the Brazilian flag or that of any other nation."[2]

The King of Denmark issued April 29, 1898, a proclamation prohibiting Danish subjects "to transport contraband of war for any of the belligerent powers."[3]

Great Britain's proclamation of April 23, 1898, warned British subjects against doing any act "in derogation of their duty as subjects of a neutral power," or "in violation or contravention of the law of nations," among which was enumerated the carrying of "arms, ammunition, military stores or materials;" and declared that "all persons so offending, together with their ships and goods, will rightfully incur and be justly liable to hostile capture, and to the penalties denounced by the law of nations."[4]

The governor of Curaçao, acting under instructions of the minister of the colonies of the Netherlands, issued a

[1] Wharton's Dig., III, 607–608.

[2] Proclamations and Decrees during the War with Spain, 13.

[3] Proclamations, 22.

[4] Proclamations, 35.

decree prohibiting "the exportation of arms, ammunition, or other war materials to the belligerents."[1]

Portugal, while stating, in Article IV of her neutrality decree of April 29, 1898, that "all articles of lawful commerce" belonging to subjects of the belligerent powers might be carried under the Portuguese flag, and that such articles belonging to Portuguese subjects might be carried under the flag of either belligerent, yet declared: "Articles that may be considered as contraband of war are expressly excluded from the provisions of this article."[2]

Were further proof needed of the unneutral and noxious character of contraband trade, it might be found in the doctrine of infection, under which innocent cargo is condemned when associated with contraband merchandise of the same proprietor, and the transportation penalized by loss of freight and expenses, and, under various circumstances, by confiscation of the ship.[3]

From what has been shown it may be argued that, without regard to the recognition or nonrecognition of belligerency, a party to a civil conflict who seeks to prevent, within the national jurisdiction and at the scene of hostilities, the supply of arms and munitions of war to his adversary commits not an act of injury, but an act of self-defense, authorized by the state of hostilities; that, the right to carry on hostilities being admitted, it seems to follow that each party possesses, incidentally, the right to prevent the other from being supplied with the weapons of war; and that any aid or protection given by a foreign government to an individual to enable him with impunity to supply either party with such articles is to that extent an act of intervention in the contest.

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[1] Proclamations, 27.

[2] Proclamations, 61. (See also, the proclamation of the toatai of Shanghai, id., 20, and the instructions of the Haitian Government, id., 39.)

[3] Walker's Science of Int. Law, 511–512.

APPENDIX.

Maritime Law in the War with Spain.

By reason of the nature and incidents of the conflict, the predominant features of the recent war between the United States and Spain, from the legal as well as from the military point of view, were maritime. Important rules were announced, and many interesting questions were determined, as to the conduct of hostilities at sea, particularly with reference to commercial intercourse and the treatment of merchant ships and other private property. In order, however, to present the subject in its proper relations it is necessary to make certain observations as to the position of the parties prior to the outbreak of hostilities.

I. SITUATION PRIOR TO THE WAR.

By international law up to the present time the ships of an enemy are lawful prize, but their cargoes may or may not be subject to condemnation. On the other hand, ships of a neutral are not in themselves good prize, but may become so as the result of unneutral conduct—such as the attempt to break a blockade; and their cargoes, like those of enemy ships, may or may not be subject to confiscation, according to circumstances. As to the treatment of cargo, the following rules have been acted upon:

1. The goods of an enemy may be seized and confiscated whether found in an enemy or in a neutral ship.

2. Goods of an enemy, contraband of war excepted, are exempt from seizure and confiscation when on board of a neutral ship. This is known as the rule of "free ships, free goods."

3. The goods partake of the character of the ship: If the ship is neutral, they are free: if the ship belongs to an enemy, they are condemned. This is known as the rule of "free ships, free goods; enemy ship, enemy goods."

As the last rule is enforced only under special treaty stipulations, it does not at the moment concern us. The great contest has been waged between the first and second rules. The first, that the fate of the goods is determined by the belligerent or neutral character of the owner, without regard to whether the ship is enemy or neutral, was at one time the common law of Europe. It was laid down in the *Consolato del Mare* and was universally accepted. But about the middle of the seventeenth century a new rule began to be introduced, and it was stipulated in various treaties that the goods of an enemy should be free when on board a neutral ship. This rule was in time embodied in the marine ordinances of France. It was strenuously advocated by the Dutch. It was embraced in the declaration of the Empress of Russia of 1780, which formed the basis of the first armed neutrality. Great Britain generally adhered to the old rule, and in the maritime wars of the eighteenth century the new rule was little observed. Eventually, however, Great Britain came to accept the new rule. When the Crimean War broke out, she joined France in proclaiming that enemy property on board a neutral ship would be respected. Then, at the close of the war, came the famous Declaration of Paris of April 16, 1856, by which the signatory powers (France, Great Britain, Russia, Prussia, Austria, Sardinia, and the Ottoman Porte), with a view "to establish a uniform rule on a point so important," announced their adherence to the rule and engaged to invite other powers to adhere to it. The declaration contained in all four rules, which were as follows:

"1. Privateering is and remains abolished.

"2. The neutral flag covers an enemy's goods, with the exception of contraband of war.

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

"4. Blockades in order to be binding must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."

These rules, in accordance with the resolution of the Congress of Paris, were brought to the notice of the powers for acceptance or rejection as a whole, and were accepted by all the German States, by the Two Sicilies and the Papal States, and, indeed, by all the powers except the United States, Mexico, Spain, and Venezuela. The United States, whose objection was based upon the fact that while privateering was to be abolished the capture of enemy ships and of enemy property on board such ships was still to be permitted, offered to adhere to the declaration on condition that it be so amended as to exempt private property at sea altogether from capture, save in the case of contraband or of blockade. This offer, which was made in the closing days of the administration of President Pierce, was withdrawn by President Buchanan before any definite action upon it was taken. On the outbreak of the civil war the United States offered to accept the declaration in its entirety, but this offer came to naught, since it was found to involve the recognition of the right of the United States to bind the Confederacy, which had authorized the issuance of privateering commissions.

As the United States had not become a party to the Declaration of Paris, it is important to ascertain what was its actual position with respect to the rules therein laid down, prior to the war with Spain. As to the first and fourth rules, this question may readily be answered. The rule that blockades in order to be binding must be effective, had always been maintained by the United States as a principle of international law. On the other hand, the United States, while seeking on various occasions to establish the exemption of private property at sea from capture, had maintained the right, so long as such an exemption was not established, to employ privateers, although during the civil war the Government issued no commissions for that purpose. But, as to the second and third rules, the position of the United States has often been imperfectly apprehended. The rule that neutral goods, with

the exception of contraband of war, are not liable to capture under the enemy's flag, has always been acted upon by the United States, save in case of special treaty stipulations to the contrary; but, with the rule that free ships make free goods, the case is different. Mr. Seward, referring to this rule, as embodied in the Declaration of Paris, once said: "We have always practiced on the principles of the declaration."[1] Similar expressions may be found in the works of publicists, but they are inaccurate. Our courts, except where a treaty prescribed a different rule, had uniformly confiscated enemy property, even when it was seized under a neutral flag. And what is to be said as to our treaties? In only ten of them, made with seven powers—Algiers, 1816; Morocco, 1787 and 1836; Prussia, 1785 and 1828; Spain, 1795; Tripoli, 1796 and 1805; Tunis, 1797; and Venezuela, 1860—had the rule of "free ships, free goods" been stipulated for unconditionally, contraband always excepted. In six treaties—Russia, 1854; Two Sicilies, 1855; Peru, 1856; Bolivia, 1858; Hayti, 1864, and the Dominican Republic, 1867—the principle of "free ships, free goods" was recognized as "permanent and immutable," but the contracting parties engaged to apply it only to the commerce and navigation of such powers as should "consent to adopt" it as "permanent and immutable." Of these treaties those with the Dominican Republic and the Two Sicilies had ceased to be in force, and that with Peru had been superseded. In our treaty with Spain of 1819 the principle of "free ships, free goods" was acknowledged, but only in regard to the property of enemies whose governments recognized it. Similar stipulations may be found in our treaties with Italy of 1871 and Peru of 1887, and indeed in the first treaty ever concluded by the United States—the treaty of amity and commerce with France of February 6, 1778. But in the treaty with France they were coupled with yet another stipulation restrictive of neutral commerce—namely, that the goods of the citizens of the contracting parties should be confiscated, if laden on the ship of an enemy, unless they were shipped before the

[1] Instruction to Mr. Dayton, minister to France, September 10, 1861, Dip. Cor., 1861, 233, 235.

declaration of war, or within a certain time afterwards in ignorance of the declaration. These associated stipulations are found more generally than any others in our treaties relating to neutral rights, as may be seen by the following list: Brazil, 1828; Central America, 1825; Chile, 1832; Colombia, 1824 and 1846; Ecuador, 1839; France, 1800; Guatemala, 1849; Mexico, 1831; the Netherlands, 1782; Peru, 1851; Peru-Bolivia, 1836; Salvador, 1850 and 1870; Sweden, 1783; Sweden and Norway, 1816 and 1827; and Venezuela, 1836. But at the outbreak of the war with Spain all these treaties, except those with Colombia (1846), Salvador (1870), and Sweden and Norway (1827), had ceased to be in force. With Great Britain we had had no engagement on the subject except that embodied in the treaty of 1794, which acknowledged the rule of the common law.

Such was the situation on the eve of the war with Spain.

II. DECLARATIONS OF WAR.

April 20, 1898, the President approved a joint resolution of Congress, by which it was declared (1) that "the people of Cuba are, and of right ought to be, free and independent;" (2) that it was the duty of the United States to demand, and that the United States did thereby demand, that Spain at once relinquish her authority and government in Cuba and withdraw her land and naval forces from the island and its waters; (3) that the President was directed and empowered to use the land and naval forces of the United States and to call into actual service the militia, to such extent as might be necessary to carry these resolutions into effect; and (4) that the United States disclaimed any disposition or intention to exercise sovereignty, jurisdiction, or control over the island except for the pacification thereof, and asserted its determination, when that was accomplished, to leave the government and control of the island to its people.

On the same day the Spanish minister at Washington asked for and obtained his passports, and the text of the joint resolution was cabled by the United States to its minister in Madrid for communication to the Spanish Govern-

ment. But before it could be so communicated the American minister, on April 21, received from the Spanish Government a note, in which it was stated that the joint resolution was considered as an obvious declaration of war, and that all diplomatic relations consequently were severed.[1] On April 22 the President issued a proclamation, in which, referring to the joint resolution of Congress, he declared a blockade of ports on the north coast of Cuba from Cardenas to Bahia Honda, and of the port of Cienfuegos on the south coast. The blockade was instituted on the same day. By an act of Congress approved April 25, 1898, war was declared to have existed since April 21, inclusive, and the President was directed and empowered to use the entire land and naval forces of the United States, and to call into actual service the militia for the purpose of carrying it on.

III. ADOPTION OF THE ADDITIONAL ARTICLES OF THE GENEVA CONVENTION.

By the convention signed at Geneva, August 22, 1864, commonly called the Red Cross convention, various humane regulations were adopted for the amelioration of the condition of the wounded in the field. In 1868 a second international conference was held at Geneva, and fifteen articles, known as the "additional articles of 1868," were proposed, of which Articles VI to XV related exclusively to marine warfare. During the Franco-German war the additional articles were adopted as a modus vivendi between the belligerents. On March 1, 1882, they were acceded to by the United States, but the accession was subject to a general exchange of ratifications, which the powers failed to effect. Nevertheless, although the additional articles had not become internationally operative, the United States, on the breaking out of hostilities, at once commissioned the ambulance ship *Solace* to accompany the Atlantic fleet as a noncombatant hospital ship, and, in the spirit of those articles, to render aid to the sick, wounded, and dying. April 23, 1898, the Swiss minister at Washington proposed the formal adoption of

[1] H. Ex. Doc. 428, 55 Cong., 2 sess.

the additional articles, with certain amendments or elucidations, by the United States and Spain as a modus vivendi pending hostilities. This proposal was accepted by both Governments.[1]

IV. DECLARATIONS OF NEUTRALITY.

On the outbreak of the war, announcements of neutrality were made by numerous powers. These announcements in some cases were brief and informal, and in others took the shape of proclamations and decrees, in which various rules, more or less comprehensive in their nature, were laid down.[2] Before the commencement of hostilities, the United States purchased two warships then building in England—a torpedo boat, and the Brazilian cruiser *Almirante Abreu*. When war was announced, the British Government promptly prohibited the departure of the nearly completed torpedo boat, which had been named the *Somers*, and stopped work on the cruiser. This action appeared to be in conformity with the obligations of neutrality, and was acquiesced in by the United States.[3] The war ships were purchased about the middle of March, 1898.[4] Permission for the departure of the *Somers*, which had been stored at Falmouth, was granted on the practical conclusion of the peace negotiations at Paris, the United States having, besides, assured the British Government that in the event of the renewal of hostilities with Spain the vessel would not be made use of.[5]

An interesting question arose as to the U. S. S. *Monocacy* in China. By communications of the tsungli yamên

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[1] For. Rel., 1898, 1148–1159.

[2] Proclamations and Decrees during the war with Spain: Washington, Government Printing Office, 1899.

[3] Mr. Hay, Sec. of State, to Mr. House, Feb. 15, 1900, 243 MS. Dom. Let., 70.

[4] Mr. Sherman, Sec. of State, to Mr. White, chargé d'affaires at London, telegrams, March 7 and 9, 1898, MS. Instr. to Gr. Br., XXXII, 423, 424; Mr. Day, Acting Sec. of State, to Mr. White, March 13, 1898, Id.

[5] Mr. Hay, Sec. of State, to Mr. White, Nov. 19, 1898, MS. Instr. to Gr. Br., XXXIII, 33; Mr. White to Mr. Hay, tel., Dec. 9, 1898 (stating that permission was granted), MS. Desp., Gr. Br.; Mr. Hay to the Sec. of the Navy, Dec. 10, 1898, 233 MS. Dom. Let., 175; Mr. Hay to Mr. White, Dec. 13, 1898, MS. Instr. Gr. B., XXXIII, 45.

to Mr. Denby, United States minister at Pekin, of May 2 and May 9, 1898, official announcement was made that the yamên had telegraphed the viceroys, governors, and taotais-general of the Yangtze and maritime provinces to instruct their subordinates to observe the laws of neutrality. In the communication of the 9th of May it was stated that, in due observance of international law, vessels of war of the belligerents would not be allowed to "anchor in Chinese ports." In the proclamation of the taotai of Shanghai, issued May 22, 1898, it was more precisely declared that such vessels must not use Chinese-controlled waters and ports for anchorage or fighting purposes, or anchor there for lading war supplies; and that, should any such vessel enter a Chinese port, except under stress of weather or for necessary food or repairs, it must not remain over twenty-four hours.[1] A question having arisen as to the applicability of these provisions to the *Monocacy*, an antiquated ship of war of light draft, which had, because of her adaptation to river service, for years been kept in Chinese waters for the protection of American citizens, the Government of the United States maintained (1) that, as the circumstances of her long-continued employment and her unfitness for service at sea rendered it apparent that her presence was not connected with the war, she did not come within the operation of rules designed to prevent the use of neutral waters as a base of hostilities, and (2) that the existence of war between the United States and a third power could not deprive the former of the right to take the customary measures for the protection of its citizens in China.[2]

In the latter part of August, 1898, ten days after the signature of the preliminary peace protocol, the British Government granted permission for Admiral Dewey to dock, clean, and paint the bottoms of the vessels under his command at Hongkong. In making the application for this privilege the United States observed that such an operation could not, under the existing circumstances, be considered as connected with actual hostilities, but was in

[1] Proclamations and Decrees during the War with Spain, 18–20.

[2] Mr. Day, Sec. of State, to Mr. Denby, June 7, 1898, MS. Instr. to China, V, 566.

the nature of repairs affecting the preservation of the vessels.[1]

An incident of the early stages of the conflict suggests the need of an amplification of the rule by which a belligerent man-of-war is required, except in case of stress of weather or of need of provisions or repairs, to leave a neutral port within twenty-four hours after her arrival. On May 11, 1898, Captain Cotton, of the auxiliary cruiser *Harvard*, cabled from St. Pierre, Martinique, to the Secretary of the Navy that the Spanish torpedo-boat destroyer *Furor* had touched during the afternoon at Fort de France, Martinique, and had afterwards left, destination unknown, and that the governor had ordered him not to sail within twenty-four hours from the time of the *Furor's* departure. At noon on the 12th of May Captain Cotton was informed by the captain of the port, at St. Pierre, that the *Furor* had about 8 a. m. again called at Fort de France and would leave about noon, and that he might go to sea at 8 p. m.; but that, if he did not do so, he would be required to give the governor twenty-four hours' notice of his intention to leave the port. On the same day Captain Cotton received information which led him to telegraph to the Secretary of the Navy that he was closely observed and blockaded at St. Pierre by the Spanish fleet, and that the Spanish torpedo-boat destroyer *Terror* was at Fort de France. Later, Captain Cotton cabled that the Spanish consul protested against his stay at St. Pierre, and that he had requested permission to remain a week to make necessary repairs to machinery. Replying to these reports, the Secretary of the Navy telegraphed to Captain Cotton as follows: "Vigorously protest against being forced out of the port in the face of superior blockading force, especially as you were detained previously in the port by the French authorities because Spanish men-of-war had sailed from another port. Also state that United States Government will bring the matter to the attention of the French Government. Urge United States consul to protest vigorously." It proved to be unnecessary to take further action. Captain Cotton's request for time was granted. The governor showed no

[1] Mr. Day, Sec. of State, to Mr. Hay, Ambassador at London, Aug. 22, 1898; Mr. Hay to Mr. Day, Aug. 23, 1898: For. Rel., 1898, 1002.

disposition to force him out of port, only requiring twenty-four hours' notice of an intention to sail; and the dangers to which the *Harvard* seemed to be exposed soon disappeared.[1] It may be observed, however, that as the enforcement, under circumstances such as were described, of the twenty-four hours' limit, would constitute a negation of the admitted privilege of asylum, it is not likely that it would be held to be applicable in such a situation.

The Spanish torpedo-boat destroyer *Temerario*, which was reported to have been sent down the coast of South America to intercept the U. S. S. *Oregon* on her way around Cape Horn to Cuba, was permitted by the Paraguayan Government to lie up during the war at Asuncion, in a condition of disability unfitting her for service.

A number of the neutrality proclamations contained a clause limiting the supply of coal which a belligerent vessel might obtain to a quantity sufficient to take such vessel to the nearest port of its own country, or, in other words, to its nearest national port. In the decree of the Netherlands, the provision read that "the store of coal shall only be supplemented sufficiently to allow the ship or vessel to reach the nearest port of the country to which it belongs, or that of one of its allies in the war." When the Spanish fleet, which was afterwards destroyed at Santiago, arrived off Curaçao on the 14th of May, 1898, the commander sought from the Dutch colonial authorities permission to await there 5,000 tons of coal which had been sent thither. This request was denied, as well as a request for permission to ship the coal whenever it should arrive. A request that each vessel be allowed to take 700 tons was likewise refused. Finally, permission was asked and granted for two of the vessels, the *Maria Teresa* and the *Vizcaya*, to enter the harbor and each to take 200 tons, the rest of the ships meanwhile to remain at anchor in the roads. The 400 tons thus obtained were said to be of "very poor quality."[2]

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[1] Naval Operations of the War with Spain, 383–389, 407–410.

[2] Mr. Newel, minister at The Hague, to the Sec. of State, May 20, 1898, MSS. Dept. of State; Mr. Moore, Assistant Sec. of State, to the Sec. of the Navy, June 2, 1898, 229 MS. Dom. Let., 93; Mr. Smith, consul at Curaçao, May 16 and May 18, 1898, MSS. Dept. of State. There was at one time a rumor, which proved to be erroneous, that

When, in the latter part of May, 1898, it was rumored that the Spanish armored squadron had sailed or was about to sail to the United States and might stop at the Azores for coal, the minister of the United States at Lisbon was instructed to protest against its coaling at those islands, on the ground that, as they lay entirely outside the route from Spain to the Spanish West Indies, such an act would convert the Portuguese territory into a base of hostile operations against the United States.[1] The squadron did not in fact sail westward, but afterwards proceeded on the way to the East as far as the Suez Canal and then returned to Spain.

Before the outbreak of hostilities, the Pacific Mail Steamship Company was permitted, under its agreement with the Mexican Government, to furnish supplies of coal to United States men-of-war at Acapulco. During the war, the Mexican Government placed limitations on the supply of coal to belligerent vessels in its ports, and made no exception as to United States vessels at Acapulco. The Department of State abstained from addressing any representation to Mexico on the subject, on the ground that as it had "on numerous recent occasions asked of Mexico the strict execution of its neutral duties," it was "not disposed, upon the strength of an agreement between the Pacific Mail Steamship Company and the Mexican Government, made before the war, to insist that public ships of the United States may now be allowed to take coal without limit in a Mexican port."[2]

By an act of Congress of April 22, 1898, the President was "authorized, in his discretion and with such limitations and exceptions as shall seem to him expedient, to prohibit the export of coal or other material used in war

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the *Maria Teresa* and the *Vizcaya* each obtained at Curaçao 600 tons of coal, which was far more than enough to take them to Porto Rico, the nearest Spanish possession, or to Cuba. By such a transaction Curaçao would have been "converted into a base of hostile operations for Spanish vessels in violation of neutrality." (Mr. Day, Sec. of State, to Mr. Newel, tel., May 17, 1898, MS. Inst. to the Netherlands, XVI, 357.)

[1] Mr. Day, Sec. of State, to Mr. Townsend, tel., May 20, 1898, MS. Inst. Portugal, XVI, 146.

[2] Mr. Day, Sec. of State, to the Sec. of the Navy, Aug. 5, 1898, 230 MS. Dom. Let., 541.

from any seaport of the United States until otherwise ordered" by himself or by Congress. For the purpose of enforcing the provisions of this act, as well as of regulating the subject of exportations generally during the continuance of the war, a circular was issued by the Treasury Department, April 27, 1898. Under the regulations and practice of that Department, the interested persons were required to apply to the proper collector of customs for permission to clear the coal, stating who were the shippers and who the consignees. They were also required to make affidavit that the coal was not destined directly or indirectly for the enemies of the United States, and to agree to advise the Treasury Department by telegraph of the arrival of the coal at its destination immediately upon such arrival. The Treasury Department reserved the right to require the shipper to give bond for the transportation of the coal to the port for which clearance was asked, and from this bond he was not released till the cargo had arrived at that port or had been satisfactorily accounted for. This requirement was designed to prevent collusive captures, and was not as a rule exacted where the collector recommended the clearance and the standing of all the parties concerned was such as to convince the Treasury that the additional safeguard might be dispensed with. In this and in other particulars the action of the Treasury was largely governed by the circumstances of the case.[1] The restrictions on exportation naturally resulted in a real or apprehended scarcity of coal at places which depended on the United States, in whole or in part, for their supply. At Vera Cruz, for example, where there is a considerable demand for the article for railways, double freight rates were offered for cargoes in the latter part of May.[2]

V. DECLARATIONS AS TO MARITIME LAW.

April 22, 1898, the Department of State, in a telegraphic instruction to the diplomatic represensatives of the United States, declared among other things that, in the event of

[1] Mr. Day, Sec. of State, to Mr. Andrade, June 6, 1898, MS. Notes to Venez. Leg., II, 22.

[2] Mr. Moore, Assist. Sec. of State, to the Treasury Dept., May 25, 1898, 227 MS. Dom. Let., 641.

hostilities with Spain, the "policy" of the United States "will be not to resort to privateering." The Spanish Government, by a royal decree of April 23, 1898, embodying the rules which it proposed to observe during the war, reserved the right to issue letters of marque. Of this reservation Spain afterwards took no advantage. The decree also declared that the Government would, for the purposes of cruising, organize a service of "auxiliary cruisers of the navy," composed of "ships of the Spanish mercantile navy" and "subject to the statutes and jurisdiction of the navy."

The United States organized an auxiliary force, under the command of officers of the Navy. The conditions under which this service was established are set forth in the case of *The Rita*,[1] relating to the distribution of prize money among the officers and crew of the auxiliary cruiser *Yale*, formerly the steamer *City of Paris* of the International Navigation Company, commonly called the American Line.

The *City of Paris* was one of a class of steamers which were, under the provisions of the mail-subsidy act of March 3, 1891, subject to be taken by the United States as cruisers or transports upon the payment of their actual value. By a charter party and supplementary agreement entered into April 30, 1898, between the company and the Secretary of the Navy, possession of the ship was transferred to the Government, by which she was heavily armed and converted into an auxiliary cruiser. The charter party provided that the ship should be "manned, victualled, and supplied at the expense of the charterer." The charterer was also to pay all other expenses, and at the termination of the charter, which was to be at the charterer's will, was to return the ship in good repair, less ordinary wear and tear. The supplementary agreement provided that the ship was "to be manned by her regular officers and crew, and in addition thereto was to take on board two naval officers, a marine officer, and a guard of thirty marines, and was to be victualled and supplied with two months' provisions and about four thousand tons of

[1] 89 Fed. Rep., 763.

coal, the actual cost to the owner of such additional equipment and services to be reimbursed by the charterer upon bills to be certified by the senior naval officer on board." There were also stipulations protecting the owner against all expenses and liability, and a provision that during the continuation of the supplementary agreement the steamship was to be "under the entire control of the senior naval officer on board." Under these agreements the Government of the United States placed on board the ship a captain and a lieutenant of the Navy and a marine guard of 25 enlisted men. There were also on board 269 other persons, not commissioned by or regularly enlisted in the service of the United States, but comprising the ship's company, both officers and men, who were doing duty on board and were borne on the books of the ship. On a question that arose as to the distribution of prize money it was held that the *Yale* was neither a "vessel of the Navy" nor a privateer, but came within the statutory class of vessels "not of the Navy, but controlled by either Executive Department," and was, as an "armed vessel in the service of the United States," "entitled," in the words of the statute, "to an award of prize money in the same manner as if such vessel belonged to the Navy."[1]

In the telegram of April 22, above cited, the Government of the United States, besides announcing its policy in regard to privateering, stated that it would adhere to the second, third, and fourth rules of the Declaration of Paris, as "recognized rules of international law."

On April 26, the President issued a proclamation more fully defining the position of the Government on questions of maritime law. By this proclamation the announcement that it would not be the policy of the United States to resort to privateering was repeated; and following this announcement, six rules were promulgated for the observance of officers of the United States during the conflict.

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[1] See, as to the "volunteer navy" organized by Prussia during the Franco-German war, Hall, Int. Law, 4th ed., 547–550.

By the act of March 3, 1899, for the reorganization of the U. S. Navy and Marine Corps, all provisions of law authorizing the distribution among captors of prize money or providing for the payment of bounty are repealed. (30 U. S. Statutes at Large, 1004, 1007.)

These rules, the first three of which embodied the substance of the second, third, and fourth rules of the Declaration of Paris, were as follows:

"1. The neutral flag covers enemy's goods, with the exception of contraband of war.

"2. Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag.

"3. Blockades in order to be binding must be effective.

"4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government.

"5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

"The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

The rules to be observed by the Spanish Government were embodied in the royal decree of April 23, 1898. This decree allowed only five days from the date of its publication for the departure of American ships from Spanish ports. It did not in terms prohibit the capture of such ships after their departure, nor did it provide for

the entrance and discharge of American ships sailing for Spanish ports before the war.

As no captures were made by Spain, no opportunity occurred for the judicial construction of the rules which that Government announced for its guidance. In respect of some of the captures made by the United States, there arose interesting questions which became the subject of judicial decision.[1]

VI. VESSELS IN PORT BEFORE OR AFTER THE OUTBREAK OF THE WAR.

In the case of the *Buena Ventura* an important application was made of rule 4 of the proclamation of April 26. The *Buena Ventura* was a Spanish merchant steamship, which was captured by the United States steamship *Nashville*, eight or nine miles off the Florida coast. On the 27th of May she was condemned by the United States district court for the southern district of Florida as enemy property.[2] This sentence was reversed by the Supreme Court of the United States.[3] It appeared that the *Buena Ventura* was, at the time of her capture, on a voyage from Ship Island, in the State of Mississippi, to Rotterdam, by way of Norfolk, Virginia, with a cargo of lumber. She arrived at Ship Island March 31, 1898, and sailed for Rotterdam on April 19, with a permit, obtained in accordance with the laws of the United States, to call at Norfolk for a supply of bunker coal. She was captured on the morning of April 22. She made no resistance, had on board no military or naval officer, and carried no arms or munitions of war. It was undisputed that when captured she was on her way to Norfolk, and that her papers for that purpose were in due form. The opinion of the Supreme Court was delivered by Mr. Justice Peckham. The question at issue was whether she could be brought within the exemption of the fourth rule of the proclamation of April

[1] A list of all the prizes made by the United States naval forces on the North Atlantic stations may be found in the Naval Operations of the War with Spain, 316–325.

[2] *Buena Ventura et al.*, 87 Fed. Rep., 927. The cargo, being the property of neutrals and not contraband of war, was restored.

[3] The *Buena Ventura*, 175 U. S., 384.

26 as to "Spanish merchant vessels, in any ports or places within the United States." In the course of his opinion Mr. Justice Peckham observed that the vessel in question, as a merchant vessel of the enemy carrying on an innocent commercial enterprise at or just prior to the time when hostilities began, belonged to a class which the United States had always desired to treat with great liberality, and which civilized nations had in their later practice in fact so treated. The President's proclamation should therefore receive "the most liberal and extensive interpretation" of which it was capable, and, where two or more interpretations were possible, the one most favorable to the belligerent in favor of whom the proclamation was issued. The provision that "Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing," might, said the learned justice, be held to include (1) only vessels in port on the day when the proclamation was issued, namely, April 26, or (2) those in port on April 21, the day on which war was declared by Congress to have begun, or (3) not only those then in port, but also any that had sailed therefrom on or before May 21, whether before or after the commencement of the war or the issuing of the proclamation. The court adopted the last interpretation. While the proclamation did not in so many words include vessels which had sailed from the United States before the commencement of the war, such vessels were, said Mr. Justice Peckham, clearly within its "intention," under the liberal construction which the court felt bound to give it. In view of the fact, however, that, at the time of the capture, the proclamation of April 26, without which the vessel would have been liable to condemnation, had not been issued, restitution was awarded without damages or costs.[1]

The effect of the fourth rule of the proclamation of April 26 was again considered in the case of the Spanish steamship *Panama*. This vessel was condemned by the court of original jurisdiction as enemy property,[2] and the decree

[1] The Chief Justice and Justices Gray and McKenna dissented from the decision of the court.

[2] *Buena Ventura et al.*, 87 Fed. Rep., 927.

was confirmed by the Supreme Court.[1] The *Panama*, a steamship of 1,432 tons register, owned by the Compania Transatlantica, a Spanish corporation of Barcelona, Spain, and carrying the Spanish flag, sailed from New York on April 20, 1898, for Havana, Cuba, and certain Mexican ports, with a general cargo and passengers and mails. April 25, when about twenty-five miles from Havana, she was captured by a United States man-of-war. The *Panama* had a commission as a royal mail ship from the Spanish Government and a crew of seventy-one men, who had been shipped at various times at Havana, and she carried twenty-nine passengers, all of whom, with the exception of one Frenchman, were Spaniards. Mr. Justice Gray, who delivered the opinion of the Supreme Court, said that the case of the *Buena Ventura* would be decisive of that of the *Panama*, but for the mails and the arms carried by the latter vessel and the contract under which she sailed. Under that contract, which was entered into in 1886, the Spanish Government had the right to take possession of the steamer in case of war; and it was required that the ships belonging to the line should be specially adapted to use in war, and that every mail steamer should carry a certain armament "for her own defense." The officers and crew, and so far as possible the engineers, were to be Spaniards. When captured the *Panama* carried two breech-loading Hontoria guns of nine centimeter bore, one mounted on each side of the ship; one Maxim rapid-fire gun on the bridge; twenty Remington and ten Mauser rifles, with ammunition for all the guns and rifles; and thirty or forty cutlasses. The guns had been put on board three years before, and the small arms or ammunition a year or more; and all her armament was carried in compliance with the mail contract, except the Maxim gun and the Mauser rifles. It might be assumed, said the court, that the primary object of the steamer's armament, and in time of peace its only object, was that of defense. The armament, however, was not in itself inconsiderable, and after the capture of the vessel her arms and ammunition were delivered over for the use of the United States Navy.

[1] The *Panama*, 176 U. S., 535.

The ship was therefore enemy property, bound to an enemy port, carrying an armament susceptible of use for hostile purposes, and herself liable, on arriving in that port, to be appropriated by the enemy for such purposes. The intent of the proclamation, continued the court, was to exempt for a time from capture peaceful commercial vessels, and not to assist the enemy in obtaining weapons of war; and it could not be reasonably construed as exempting from capture "a Spanish vessel owned by a subject of the enemy; having an armament fit for hostile use; intended, in the event of war, to be used as a war vessel; destined to a port of the enemy; and liable, on arriving there, to be taken possession of by the enemy and employed as an auxiliary cruiser in the enemy's navy."

VII. VESSELS SAILING FOR AN ENEMY PORT BEFORE THE WAR.

The proper application of the fifth rule of the proclamation of April 26 was considered by the Supreme Court in the case of the Spanish merchant steamer *Pedro*,[1] which was condemned by the court below as enemy property.[2] The *Pedro*, which was a British-built ship and for several years sailed under a British registry, was transferred in 1887 to a Spanish corporation of Bilbao, Spain, and was duly registered as a Spanish vessel. Thereafter she sailed under the Spanish flag and was officered and manned by Spaniards, though she was employed for the transportation of merchandise for hire under the management of a Liverpool firm. Her usual course was to take cargo in Europe for Cuban ports and, after discharging there, to proceed to the United States and obtain cargo for Europe, the round trip occupying about three months. On March 18, 1898, while she was loading in Antwerp for Cuba, she was chartered by an American firm to proceed to Pensacola, Florida, or Ship Island, Mississippi, for a cargo of lumber for Rotterdam or Antwerp. Soon afterwards she left Antwerp with about two thousand tons of merchandise of various

[1] *The Pedro*, 175 U. S., 354. The case of the *Guido*, 175 U. S., 382, is similar, and was decided on the strength of that of the *Pedro*, without an extended opinion.

[2] *Buena Ventura et al.*, 87 Fed. Rep., 927.

kinds for Havana and Cienfuegos. She arrived at Havana on April 17 and, after discharging most of her cargo, sailed on the 22d for Santiago, Cuba, with a small quantity of general merchandise taken at Havana. On the same day she was captured a few miles off Havana by a cruiser of the United States blockading fleet. Her condemnation was resisted on the ground, among others, that her true destination was a port in the United States, so that she fell within the exemption contained in rule five. The court, Chief Justice Fuller delivering the opinion, declined so to hold. The Chief Justice observed that the *Pedro* remained at Havana from the 17th of April to the 22d, and left on the latter day, which was the day after the war began; that she then had no cargo for any port in the United States, but only for Santiago and Cienfuegos, in Cuba. She had not left a foreign port in ignorance of the "perilous condition of affairs," but must be assumed to have been advised of the imminency of hostilities; nor was she bringing a cargo to the United States for the increase of its resources and the convenience of its citizens. On the contrary, she was captured while trading from one enemy port to another, being herself an enemy vessel. Under these circumstances, the fact that she was under contract ultimately to proceed to a port of the United States to take cargo for Europe did not, said the Chief Justice, bring her within the exemption of the fifth rule; and he declared that the doctrine of continuous voyages, as laid down by the court on various occasions, did not apply to the case.[1] The decree of condemnation was therefore affirmed.

Mr. Justice White delivered a strong dissenting opinion, in which Justices Brewer, Shiras, and Peckham concurred. In this opinion it was argued that the principal voyage of the vessel was from Antwerp to the United States, the calling at Cuban ports being merely incidental, that, although Congress afterwards declared that war should be considered as having existed on and after April 21, it was neither conceived nor known, when she left

[1] The Chief Justice discussed and distinguished the following cases: The *Circassian*, 2 Wall., 135; the *Bermuda*, 3 Wall., 514; the *Springbok*, 5 Wall., 1; the *Joseph*, 8 Cranch, 251; the *Argo*, Spinks's Prize Cases, 53.

Havana on the 22d, that a state of war existed; that, just before her departure from Havana, one American ship was allowed to sail from that port, and, shortly after her departure, another; and that the reference to the fact that the *Pedro* had no cargo for the United States ignored the enlightened moral purpose of the proclamation, and particularly the provisions of the fourth rule, which allowed enemy ships not only to depart from the United States but also to load and take away cargo either for a neutral port or for a port of the enemy not blockaded.[1]

VIII. QUESTIONS OF ENEMY OWNERSHIP.

In three well-considered cases, two of which related to vessels and the third to cargo, the question was raised as to whether the captured property, whose condemnation was demanded as enemy property, legally bore that character. The first case was that of the *Pedro*,[2] to which I have already adverted. After the preparatory proofs were taken, the master appearing on behalf of the owners made a claim to the vessel and moved for leave to take further proof on the ground that although a majority of the stock of the Spanish corporation, to which the vessel ostensibly belonged, was registered in the names of Spanish subjects and only a minority in the names of British subjects, one of the latter had possession of all the certificates of stock, in consequence of which he was, under the charter of the company, the sole beneficial owner of the steamer; that the transfer from British to Spanish registry was made solely with a view to facilitate her engaging in commerce with the Spanish colonies; that it was the intention of the British stockholders to restore her to the British registry and flag whenever the trade might be disturbed; and that

[1] Mr. Justice White also contended that the decision of the *Argo*, Spinks's Prize Cases, 53, was a decision *in consimili casu*, and should be treated as an authority for the restoration of the *Pedro*.

A Spanish vessel which sailed from England April 9, 1898, touched at Corunna, Spain, April 16, and then sailed for ports in Porto Rico, did not come within the proclamation of April 26, but was, after the outbreak of war, subject to capture as enemy property. (The *Rita*, 87 Fed. Rep. 925; S. P., the *Maria Dolores*, 88 Fed. Rep. 548.

[2] 175 U. S. 354; *supra*, p. 157.

the steamer was insured by British underwriters, by whom, if she should be condemned, the loss would be borne. The court below refused to allow further proof to be taken, and this ruling was affirmed by the Supreme Court. The vessel, said the Supreme Court, belonged to a Spanish corporation, had a Spanish registry, was sailing under the Spanish flag and a Spanish license, and was officered and manned by Spaniards. Nothing was better settled than that she must, under such circumstances, be deemed a Spanish ship and treated accordingly.[1] When the stockholders elected to take the benefit of the Spanish navigation laws, they must be held also to have elected to rely on the protection of the Spanish flag. The alleged intention to restore the vessel to British registry, if war should render the change desirable, could not be regarded, since it had not been carried into effect when she was captured. The Spanish ownership having been made out, the facts that the stock of the corporation belonged legally or equitably to British subjects, and that the loss would eventually be borne by British underwriters were, said the court in conclusion, immaterial.

In the case of the *Benito Estenger*[2] a question was raised as to the validity of the transfer of a vessel from a Spanish subject to a neutral during the war. The *Benito Estenger* was captured by the United States steamship *Hornet* June 27, 1898, off Cape Cruz, on the south side of the island of Cuba. December 7, 1898, she was condemned by the United States district court for the southern district of Florida as enemy property. The claimant appealed on the ground (1) that she was a British merchant ship, duly documented and entitled to the protection of the British flag, and lawfully owned and registered by a British subject domiciled in Great Britain, and (2) that she was engaged in a voyage in behalf of the local Cuban Junta in Kingston, Jamaica, allies of the United States, and was thus captured in the service of the United States, in the performance of friendly offices to the United States forces.

[1] Citing Story, Prize Courts (Pratt's ed.) 60, 66; the *Friendschaft*, 4 Wheat. 105; the *Ariadne*, 2 Wheat. 143; the *Cheshire*, 3 Wall. 231; Hall, Int. Law, §169.

[2] 176 U. S., 568.

It appeared that prior to June 9, 1898, the vessel was the property of Enrique de Messa, a Spanish subject resident in Cuba, and that on that day a bill of sale was made by de Messa to the claimant, Beattie, a British subject, and the vessel registered as a British vessel, at Kingston, in accordance with the requirements of British law. She had been engaged in trade with the island of Cuba, and more particularly between the ports of Kingston and Montego, Jamaica, and the port of Manzanillo, Cuba. She left Kingston June 23, and proceeded with a cargo of flour, rice, corn meal, and coffee to Manzanillo, where the cargo was discharged. She cleared from Manzanillo on June 27 for Montego, and thence for Kingston, and was captured on the same day off Cape Cruz.

The opinion of the court, which was delivered by Chief Justice Fuller, contains various observations on the enemy character, illegal intercourse with the enemy, blockade, and other matters; but it may be said that the only real questions in the case were (1) whether de Messa, though a Spanish subject, was to be treated as an enemy, and (2) whether the transfer of the ship from him to Beattie was an actual transfer made in good faith.

As to the first point, there was, said the court, "evidence tending to show that Messa sympathized with the Cuban insurgents, but no proof that he was himself a Cuban rebel or that he had renounced his allegiance to Spain." The cargo of the vessel when captured consisted chiefly of flour, and there was evidence to show that this flour, when landed at Manzanillo, was immediately transferred to the Spanish Government warehouse. The court referred to Manzanillo as a "Spanish stronghold," and observed that the delivery of the provisions to the Spanish Government constituted, under the laws of war, illicit intercourse with the enemy. It was alleged, however, that de Messa had rendered important service to the United States, that he was the friend and not the enemy of the United States, and that there was an agreement between him and the United States consul which operated to protect the vessel from capture. It appeared that de Messa had endeavored to cultivate friendly relations with the United States consul at Kingston and had given him an old Government

plan of the province of Santiago and an especially prepared chart of the harbor, in return for which he endeavored to obtain from the consul a letter of protection for the voyage which he was about to undertake. The consul declined to furnish the letter, but on June 23 wrote to Admiral Sampson that de Messa offered to give certain information that might be valuable and proposed to be off Cape Cruz on June 30, adding: "You quite understand that in dealing with those people, one is more or less liable to imposition. I therefore make no recommendation of Messa to you." The claimant asserted, while the consul denied, that protection was given to the voyage by this letter. With reference to this contention, the court said that there was nothing to show that the voyage was undertaken on the strength of the letter, or that it in any way contributed to the capture; nor that the admiral intended to avail himself of the suggestion made in it; "but," said the court, "we do not go at length into this matter, because we think that no engagement with the United States nor any particular service to the United States was made out in that connection, and so far as appears the vessel was captured in the ordinary course of cruising duty at a time and under circumstances when her liability was not to be denied. Moreover, a United States consul has no authority by virtue of his official station to grant any license or permit the exemption of a vessel of an enemy from capture and confiscation."[1] Referring to the same subject in another place, the court said: "Messa's status was that of an enemy, as already stated, and this must be held to be so notwithstanding individual acts of friendship, certainly since there was no open adherence to the Cuban cause, and allegiance could have been shifted with the accidents of war."

As to the question of the validity of the sale, the court said that de Messa's story of the transfer was that he was compelled to sell the steamer in order to get money to live on, and that he made the sale for $40,000, for the whole or a

[1] The court cited and discussed *Rogers* v. *The Amado*, Newberry, 400; *The Hope*, 1 Dodson, 226, 229; *The Joseph*, 8 Cranch, 451; *Les Cinq Frères*, 4 Lebau's Nouveau Code de Prises, 63; *The Maria*, 6 C. Rob., 201.

large part of which credit was given on an indebtedness to the firm of which Beattie was a member, and that he was employed by Beattie to go on the vessel as his representative and business manager. Beattie in his testimony said that the sale was *bona fide*, but declined to state of what the payment of the purchase money consisted. The consul of the United States at Kingston testified that Beattie in conversation, while insisting that the transfer was absolute, admitted that it was effected for the purpose of protecting the vessel. Apparently no money passed. The Spanish master and crew remained in charge. De Messa went on the voyage as supercargo; and in the brief of the claimant's counsel it was declared that the transfer was obviously made to protect the steamer as neutral property from Spanish seizure, while it was admitted that de Messa "still retained a beneficial interest after this sale and transfer of flags." On this statement of facts the court observed that "transfers of vessels *flagrante bello* were originally held invalid," but that the rule had been "modified." The court quoted from Hall's *International Law*, 4th edition, page 525, as containing the correct rule of law, the following passage: "In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war." [1] The burden of proof, said the court, was on the claimant. In conclusion, the court held that the requirements of the law of prize were not satisfied

[1] The court also cited Story's Notes on the Principles and Practice of Prize Courts (Pratt's ed.), 63; 2 Wheat. App., 30; *The Sechs Geschwistern*, 4 C. Rob., 100; *The Jemmy*, 4 C. Rob., 31; *The Omnibus*, 6 C. Rob., 71; *The Island Belle*, 13 Fed. Cases, 168; *The Baltica*, Spinks's Prize Cases, 264; *The Soglasie*, Spinks's Prize Cases, 104; *The Ernst Merck*, Spinks's Prize Cases, 98.

by the proofs in question, and that the condemnation was proper.[1]

In the case of the *Carlos F. Roses*,[2] in which the condemnation of the cargo was demanded as enemy property, a question was raised as to the effect of the indorsement of the bills of lading to neutrals. The vessel itself, a Spanish bark, was condemned as enemy property. The cargo was claimed by Kleinwort Sons & Co., British merchants, of London. It consisted of jerked beef and garlic, and was shipped at Montevideo in March, 1898, by Gibernau & Co., merchants of that place but citizens of the Argentine Republic. The invoices stated that the goods were shipped "to order for account and risk and by order of the parties noted below." In the invoice of jerked beef the consignees noted below were "the expedition or voyage of the *Carlos F. Roses*" and "Mr. Pedro Pagés of Havana," all concerned being Spanish subjects; the consignees of the garlic were "Mr. Pedro Pagés" and "the undersigned," Gibernau & Co. There were three sets of bills of lading issued by the master to Gibernau & Co.—one for that part of the shipment of jerked beef made for account of the vessel, another for that part made for account of Pagés, and the third for the shipment of garlic for the joint account of Pagés and Gibernau & Co. All the bills set forth that the goods were taken for the account and at the risk of whom it might concern. In the ship's manifest the destination of the cargo was stated thus: "Shipped by Pla Gibernau Co. To order." The *visé* of the Spanish consul read: "Good for Havana, with a cargo of jerked beef and garlic." There was no charter party. On the face of the papers the court held that the goods, when delivered to the vessel, became the property of the consignees named in the invoices, and that, as Gibernau & Co. had not appeared and claimed any interest, the whole cargo, which the claimants in fact admitted to be "ultimately destined for Don Pedro Pagés of Havana," must

[1] Justices Shiras, White, and Peckham dissented. The President did "not find himself justified in exercising clemency" in this case. (Mr. Hill, Acting Sec. of State, to the Attorney-General, Feb. 13, 1901, 250 MS. Dom. Let., 651.)

[2] 177 U. S., 655.

be condemned as enemy property unless cause to the contrary was shown. Such cause Kleinwort & Co. endeavored to establish, on the ground that after the shipment of the cargo they made advances upon it to the amount of about $30,000, in consideration of which the bills of lading, indorsed in blank by Gibernau & Co., were delivered to them with the intent that they should take title to the bills and the cargo, and on the arrival of the latter at its destination hold it as security, with the right to dispose of it and reimburse themselves with the proceeds. They contended that in this way they became the lawful owners both of the bills and of the cargo. It appeared, however, that in neither of the two bills of exchange, which were drawn on Kleinwort & Co. for the amount of the advances, was any reference made to the cargo, and that while two of the bills of lading were alleged to have been delivered to the firm at the time of its acceptance of the bills of exchange, the third, for the greater part of the jerked beef, was not delivered till long afterwards. On these and other circumstances the court held that the cargo, never *bona fide* passed to Kleinwort & Co., but remained the property of Spanish subjects, and was liable to condemnation.[1]

It should be noticed that safe conducts were given by the President to the *Alicante*, and other Spanish steamships, while proceeding under contract with the Government of the United States to Santiago de Cuba, and sailing therefrom to Spain, with Spanish prisoners of war surrendered to the United States army in Cuba.

IX. CASE OF THE FISHING SMACKS.

But, from the point of view of the development of law, the most important opinion delivered by the Supreme Court on the question of the liability of enemy property to condemnation was that in the case of the Spanish fishing smacks, the *Paquete Habana* and the *Lola*.[2] The particular point decided was that "coast-fishing vessels, with their implements and supplies, cargoes and crews, unarmed

[1] Mr. Justice Shiras delivered a dissenting opinion, in which Mr. Justice Brewer concurred.

[2] The *Paquete Habana*, 175 U. S., 677.

and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war." In reaching this conclusion, however, the court, through Mr. Justice Gray, who delivered the opinion, announced and applied a principle which, though often recognized by publicists, has perhaps never before been so clearly and precisely enunciated by a judicial tribunal—that is, the principle of the progressive development of international law. Referring to a decision of Lord Stowell, in which it was said that the exemption of vessels, such as those in question, was "a rule of comity only, and not of legal decision," Mr. Justice Gray said:

"The word 'comity' was apparently used by Lord Stowell as synonymous with courtesy or good will. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law. As well said by Sir James Mackintosh: 'In the present century a slow and silent but very substantial mitigation has taken place in the practice of war; and in proportion as that mitigated practice has received the sanction of time, it is raised from the rank of mere usage and becomes part of the law of nations.'—*Discourse on the Law of Nations*, 38; 1 *Miscellaneous Works*, 360."

It may be hoped that this enlightened declaration will lead our courts to abandon the repetition of the unfortunate *dicta* in Brown *v.* United States,[1] based upon the theory that it was the peculiar prerogative of a remote age to fix by its customs, however rude and barbarous they may have been, an immutable law, in comparison with which the customs of modern times are merely "comity" or "courtesy," which may be discarded at will.

X. QUESTIONS OF BLOCKADE.

The first hostile act of the United States, on the outbreak of the war, was the blockade of the ports of the north coast of Cuba from Cardenas to Bahia Honda, inclusive, and of

[1] 8 Cranch, 110. See, also, Political Science Quarterly, XVI (Sept., 1901), 409.

the port of Cienfuegos on the south coast. Subsequently, a governmental blockade was proclaimed of all ports on the south coast of the island from Cape Frances to Cape Cruz, inclusive, and of the port of San Juan, Porto Rico. Various blockades *de facto* were also maintained. The object of a blockade being to cut off all intercourse between the inhabitants of the blockaded place and the world outside, it is a general rule that while a period is allowed—usually of fifteen days—during which vessels may depart either in ballast, or with cargo bought and shipped before the commencement of the blockade, no cargo is permitted to be shipped after the blockade is instituted. In the first proclamation of blockade by the United States, which was issued April 22, a period of thirty days was allowed for the departure of neutral vessels from the blockaded ports, but nothing was said as to the cargo. The natural inference would therefore have been that no cargo could be taken on board after the blockade was instituted. But in applying the proclamation to the cases that arose under it, the United States construed it as permitting the taking of cargo during the thirty days, and when the next proclamation was issued, the point was expressly covered by a clause in which it was stated that neutral vessels lying in any of the ports to which the blockade was then extended would be allowed "thirty days to issue therefrom with cargo." The same rules were applied in the case of the *de facto* blockades established by Admiral Dewey in the Philippines.[1] These and other features of the law of blockade were included in General Orders, No. 592, entitled "Instructions to blockading vessels and cruisers," which were issued by the Navy Department, with the cooperation of the Department of State, on June 20, 1898, for the information and guidance of the naval service.

On several occasions vessels were, for special reasons and for special purposes, allowed to enter blockaded places. After the first proclamation of blockade, the French mail steamer *Lafayette* was permitted to enter the port of Havana for the purpose of landing mails and passengers. This concession was granted on the request of the French

[1] Naval Operations of the War with Spain, 99.

embassy, coupled with the representation that the vessel sailed from St. Nazaire, in France, for Havana before the proclamation was issued. A similar privilege was extended to the German steamer *Polaria* on the request of the German embassy, with the qualification that she should first obtain a formal permit from the U. S. naval commandant at Key West, that her entrance into Havana was for the sole purpose of landing her Hamburg passengers and mails, and that she should not land cargo of any kind, nor, with the exception of certain articles intended for the Emperor, take away any,[1] though permission was granted to bring away "any American or neutral passengers that may desire to depart in her, but no others."

Early in the war special permission was given to certain neutral vessels to enter specified blockaded ports in Cuba in order to bring away Americans and any neutrals who might desire to leave. The United States consul at Kingston, Jamaica, was instructed to give certificates for the purpose of passing the blockade to the designated vessels.[2]

Permission was also granted, on the request of the proper diplomatic representatives, for the British steamer *Myrtledene* and the Norwegian steamer *Folsjo* to reenter the port of Cardenas, both vessels appearing to have left that port on notification of the institution of the blockade. In each case it was stated that the steamer was not only notified of the blockade, but was also ordered to go away. The allegation that the vessels were ordered away was afterwards denied in the case of at least one of them; but, without regard to this question, there seemed to be an obvious implication that when notice of the blockade was given they were not informed of the provision in the President's proclamation allowing to neutral vessels lying

[1] Mr. Day, Sec. of State, to Mr. von Holleben, May 10 and May 13, 1898, MS. Notes to German Leg., XII, 132, 134; Mr. Moore, Assist. Sec. of State, to the Sec. of the Navy, May 13, 1898, 228 MS. Dom. Let., 460. In harmony with the conditions imposed in these cases, permission was refused to neutrals to pass the blockade merely for the purpose of taking on board and bringing away neutral property. (Mr. Day, Sec. of State, to Mr. von Holleben, Aug. 8, 1898, MS. Notes to German Leg., XII, 177.)

[2] Mr. Moore, Acting Sec. of State, to Messrs. E. A. Atkins & Co., May 3 and May 5, 1898, 228 MS. Dom. Let., 227, 269.

in any of the blockaded ports thirty days' grace, and that, if they were not expressly ordered away, they at any rate construed the notice as an order to depart. The *Folsjo* had actually taken on board a part of her cargo, and in each case the cargo which was abandoned appeared to be the property of citizens of the United States. Under these circumstances instructions were given to allow the vessels in question to reenter the port and take on board, with all possible expedition, the cargoes of sugar which they had abandoned, it being understood that the permission was granted subject to the exigencies of any active military operations; that both vessels were strictly to observe the duties of neutrality, and particularly that neither of them was to carry more men or provisions than were necessary for the voyage.[1] Subsequently, on the representation of the minister of Sweden and Norway that the *Folsjo*, after lying for some days at Key West, had proceeded to New York, and that in consequence of the delay she was required under a previous charter party to proceed to Europe, the Norwegian steamer *Uto* was allowed to take her place, with the additional condition that before proceeding to Cardenas she was to call at Key West and obtain from the commandant of the United States Naval Station a formal letter of permission.[2]

An attempt was made near the close of hostilities to establish a *de facto* blockade of the port of Sagua le Grande, on the north side of Cuba, but the attempt was abandoned under orders from Washington, and certain vessels which had been seized, ostensibly in connection with it, were released. The French steamer *Manoubia* was supposed to fall within this category, but in reality she appears to have been seized, not for any breach of blockade, but on sus-

[1] Mr. Day, Sec. of State, to Mr. Grip, May 11, 1898, MS. Notes to Swedish Leg., VIII, 88; Mr. Moore, Assist. Sec. of State, to the Sec. of the Navy, May 11, 1898, 228 MS. Dom. Let., 404.

[2] Mr. Day, Sec. of State, to Mr. Grip, May 13, 1898, MS. Notes to Swedish Leg., VIII, 89; Mr. Moore, Assist. Sec. of State, to the Sec. of the Navy, May 13, 1898, 228 MS. Dom. Let., 461. It seems that the Spanish authorities at Cardenas refused to allow the *Myrtledene* to reenter the port. (See Mr. Day, Sec. of State, to Sir J. Pauncefote, May 20, 1898, MS. Notes to Br. Leg., XXIV, 200.)

picion of "acting in the interest of the enemy."[1] August 10, 1898, the Navy Department telegraphed that it was considered best for a few days not to extend the blockade beyond what had been proclaimed, and added: "Beyond these limits be very careful not to seize vessels, unless Spanish or carrying contraband of war, as neutrals have a right to trade with ports not proclaimed blockaded."[2]

July 15, 1898, the Department of State addressed to all the foreign representatives in Washington a circular in relation to the entrance of neutral men-of-war into blockaded ports. In this circular it was stated that while there was no disposition on the part of the Government "to restrict the courteous permission heretofore accorded to neutral men-of-war to enter blockaded ports, it is advisable that all risk of error or mischance should be avoided by due attention to the rules prescribed by prudence as well as by courtesy. To this end a neutral man-of-war desiring to enter or to depart from a blockaded port should communicate with the senior officer of the blockading force." As to the port of Havana, it was said to be "advisable that neutral men-of-war * * * should, besides observing the above suggestions, approach the port from points between north by west and north by east and follow the same general course in departing," for the reason that, as the commanding officer was stationed north of Morro, "such a course would enable vessels readily to communicate with him, and thus not only attend

[1] Commander C. H. Davis, U. S. S. *Dixie*, July 26, 1898, Naval Operations of the War with Spain, 280. See, also, as to the case of the *Manoubia*, note of French ambassador to the Secretary of State, Aug. 3, 1898, MS. Notes from French Leg.; Mr. Day, Sec. of State, to the Attorney-General, Aug. 3, 1898, 230 MS. Dom. Let., 501; Mr. Hay, Sec. of State, to Sec. of the Navy, May 22, 1900, 245 MS. Dom. Let., 211. As to the British vessels *E. R. Nickerson* and *Pilgrim*, see Mr. Hay, Sec. of State, to the Attorney-General, Jan. 5, 1900, 242 MS. Dom. Let., 133, enclosing copy of a note of the British ambassador of Dec. 30, 1899; Mr. Hay, Sec. of State, to the Attorney-General, March 2, 1899, 235 MS. Dom. Let., 237. As to the Mexican steamer *Tabasqueno*, see Mr. Day, Sec. of State, to the Attorney-General, Aug. 8, 1898, 230 MS. Dom. Let. 573; Mr. Day, Sec. of State, to Sec. of Navy, Aug. 8, 1898, id. 581; Mr. Day, Sec. of State, to the Attorney-General, Aug. 11, 1898, id. 633.

[2] Naval Operations of the War with Spain, 298; also, 259.

to a matter of proper naval ceremonial, but also to avoid the danger of a neutral man-of-war being mistaken for an enemy in the dusk or in thick weather."

The receipt of this circular was acknowledged by the different members of the diplomatic corps, and in no instance was objection then or subsequently made to its contents. On the contrary, the German Government presented certain counter suggestions, of a more stringent nature, which were accepted by the United States as embodying an arrangement for the future. The rules thus agreed on were as follows:

1. That the consent of the blockading Government, obtained through the usual diplomatic channels, should, unless in a case of exceptional urgency, be a prerequisite to the entrance of a neutral man-of-war into a blockaded port.

2. That approach to the blockaded port should be made in such manner that the senior officer of the blockading squadron would with certainty identify the neutral vessel, on her appearance in the blockaded belt, as the vessel of whose coming he had been notified.

3. That, in exceptional cases, such as prevented the obtaining of previous permission through the usual diplomatic channels, the decision should rest with the senior officer present of the blockading squadron.

4. That, in the departure from a blockaded port, no special formalities were requisite other than might be necessary to identify the departing neutral, such formalities to be agreed on by her commander and the officer in command of the blockade.[1]

Three cases involving the law of blockade were adjudicated by the Supreme Court. The first of those was the case of the French steamer *Olinde Rodriguez*,[2] a steamer belonging to the Compagnie Générale Transatlantique. She sailed from Havre June 16, 1898, on her regular voyage, under her mail contract with the French Government, for the West Indian ports of St. Thomas, San Juan (Porto Rico), Puerto Plata, Cape Haytian, St. Marque, Port au Prince, Gonaives, and return, calling at the same ports. The proclamation declaring San Juan blockaded was issued

[1] For. Rel., 1898, 1159–1169.

[2] 174 U. S. 510.

June 27, 1898. The *Olinde Rodriguez* arrived at St. Thomas July 3, and on July 4 entered the port of San Juan. The United States steamship *Yosemite*, which was lying three miles southwestward of the port, on blockade duty, gave chase, but was unable to reach the steamer before she had turned in and come under the protection of the shore batteries. When on the following morning she came out, the commander of the *Yosemite*, accepting the master's statement that he did not know that the port was blockaded, endorsed on her log an official warning and permitted her to proceed. She duly completed her outward itinerary and had left Puerto Plata on her return voyage when, on July 17, she was captured by the United States steamship *New Orleans* off San Juan, on the charge of attempting to enter that port. Questions were raised (1) as to the existence of the intent to enter, and (2) as to the existence of a lawful blockade. The court below doubted the validity of the blockade, because it was maintained by only one cruiser.[1] The Supreme Court observed that the test was whether the blockade was "practically effective;" that this, though a mixed question, was one "more of fact than of law;" that, by General Orders, No. 492, "a blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous;" that, while it was not practicable to define the degree of danger that should constitute a test, it was enough that the danger was "real and apparent;" and that the question of effectiveness was not controlled by the number of the blockading force. The position could not, said the court, be maintained, that one modern cruiser, though sufficient in fact, was not sufficient in law; nor could a vessel, actually captured in attempting to enter a blockaded port, after a warning entered on her log by a cruiser off that port only a few days before, dispute the efficiency of the force to which she was subjected. The blockade was therefore held to be effective and binding. On the other hand, the court decided that the intent to break the blockade was not sufficiently established; but, in view of circumstances of suspicion,

[1] *Olinde Rodriguez*, 89 Fed. Rep., 105; 91 Fed. Rep., 274.

ordered that restitution should be awarded without damages, and that the costs and expenses of her custody and preservation, and all costs in the cause except the fees of counsel, should be imposed on the ship.

The British steamship *Newfoundland* was seized off the coast of Cuba July 19, 1898, by a United States cruiser, on a charge of attempt to violate the blockade of Havana. After the preparatory testimony was taken, an order was made for further proof;[1] and on the subsequent hearing the vessel and cargo were condemned.[2] This sentence the Supreme Court reversed.[3] The case was one chiefly of fact. It was alleged that the vessel was loitering with intent to seize an opportunity to run into Havana, that her usual lights were not displayed and that she was out of her proper course. These allegations were disputed; and the court was unwilling, upon the mere concurrence of a number of "suspicious circumstances," each one of which "standing alone" could be "explained," to hold that guilt was established. The court below, in discussing the proof of loitering, observed that it fell "very far short" of the inculpatory evidence in the cases of certain sailing vessels, which the Government had cited as precedents for condemnation: but suggested that proof less full and precise might be accepted in the case of steam vessels, owing to their superior power of movement. "Undoubtedly there is a difference," said the Supreme Court, "but if steam has increased the power of blockade runners, it has increased in greater degree, when conjoined with the range of modern ordnance, the power of blockade defenders. We recently had occasion to consider their power, and decided that a single modern cruiser might make a blockade effective."[4] It was ordered that the vessel and cargo be restored, but without costs or damages.

June 29, 1898, the steamer *Adula*, 372 tons, belonging to the Atlas Steamship Company, a British corporation, was captured by the United States steamship *Marblehead*, on the charge of an attempt to run the blockade established

[1] 89 Fed. Rep., 99.

89 Fed. Rep., 510.

[3] *The Newfoundland*, 176 U. S., 97.

[4] The court here cited the *Olinde Rodriguez*, 174 U. S., 510.

at Guantanamo Bay, in Cuba. She was proceeding at the time under a charter, entered into on the preceding day at Kingston, Jamaica, to one Solis, a Spanish subject, at whose disposal she was placed for the conveyance of passengers from the Cuban ports of Manzanillo, Santiago, and Guantanamo to Kingston. Accompanying the charter there was a letter of instructions to the master, signed by the agent of the company at Kingston, by which the master was advised that on his arrival at Guantanamo, whither he was to proceed direct, he would no doubt find American warships off the port; and he was directed, when signaled, to stop immediately and acquaint the commanding officer with the voyage, in which case, said the instructions, it was not thought that the officer would object to his continuing into port. The steamer was condemned,[1] and the sentence was affirmed by the Supreme Court, Mr. Justice Brown delivering the opinion.[2]

The questions involved were (1) the existence of a lawful blockade at Guantanamo, (2) the knowledge of the blockade by those in charge of the vessel, and (3) their intent in making the voyage from Kingston. No blockade of Guantanamo was ever proclaimed by the President, the place being east of the line established by the proclamation of June 27. But it appeared that blockades of Santiago and Guantanamo were in fact established by Admiral Sampson early in June, and were maintained till some days after the capture of the *Adula;* and, in view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, the court thought these blockades must be held to have been lawfully instituted, as an adjunct to such operations. It was contended, however, that, at the time of the capture, the port of Guantanamo was in the possession and control of the United States and that the blockade was thereby terminated. The town of Guantanamo is eighteen miles from the mouth of Guantanamo Bay. The harbor was held by

[1] *The Adula*, 89 Fed. Rep., 351.

[2] *The Adula*, 176 U. S., 361. The President did "not find himself justified in exercising clemency" in this case. (Mr. Hill, Acting Sec. of State, to the Attorney General, Feb. 13, 1901, 250 MS. Dom. Let., 651.)

United States naval vessels and by a party of marines who occupied the crest of a hill on the west side of the harbor near its entrance, but the town at the head of the bay was still held by the Spanish forces, as were several other positions near by; and the campaign in the neighborhood was in active progress, and encounters between the American and Spanish troops were of frequent occurrence. Under these circumstances the court held that "the blockade was still operative as against vessels bound for the city of Guantanamo. The occupation of a city," continued the court, "terminates a blockade because, and only because, it supersedes it; and if a vessel be bound to a port or place beyond, which is still occupied by the enemy, the occupation of the mouth of the harbor does not necessarily terminate the blockade as to such places. [1]

The blockade being lawful, the court found, upon the facts, that those in charge of the vessel had actual knowledge of its existence, and that their sailing for the port was therefore unjustifiable and properly subjected the vessel to condemnation.

XI. CONTRABAND.

The question of contraband did not become the subject of judicial controversy during the war with Spain, but it was dealt with in General Orders No. 492. Premising its definition with the explanation that "contraband of war comprehends only articles having a belligerent destination as to an enemy's port or fleet," the order specified certain articles as "absolutely contraband" and others as "conditionally contraband." The former were:

"Ordnance; machine guns and their appliances, and the parts thereof; armor plate, and whatever pertains to the offensive and defensive armament of naval vessels; arms and instruments of iron, steel, brass, or copper, or of any other material, such arms and instruments being specially adapted for use in war by land or sea; torpedoes and their appurtenances; cases for mines, of whatever material; engineering and transport materials, such as gun carriages, caissons, cartridge boxes, campaigning forges, canteens,

[1] The court cited, as decisive on this point, *The Circassian*, 2 Wall., 135.

pontoons; ordnance stores; portable range finders; signal flags destined for naval use; ammunition and explosives of all kinds; machinery for the manufacture of arms and munitions of war; saltpeter; military accoutrements and equipments of all sorts; horses."

The "conditionally contraband" were:

"Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for the enemy's forces; provisions, when destined for an enemy's ship or ships, or for a place that is besieged."

By the Spanish royal decree of April 23, 1898, contraband was defined as follows:

"Cannon, machine guns, mortars, guns, all kinds of arms and firearms, bullets, bombs, grenades, fuses, cartridges, matches, powder, sulphur, saltpeter, dynamite and every kind of explosive; articles of equipment like uniforms, straps, saddles and artillery and cavalry harness; engines, for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair and arming of war-ships; and in general all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband."

But for the last clause, which seemed to be capable of rendering the preceding specific enumeration nugatory, this paragraph would be open to little objection. Soon after its promulgation the operation of the decree was restricted, on the request of the Italian Government, by a special dispensation in favor of sulphur, which is obtained chiefly from Sicily.

XII. COMMERCIAL RELATIONS.

By the strict laws of war all trading between enemies is prohibited. On April 27, 1898, the Treasury Department issued to collectors of customs certain instructions, which were prepared in consultation with the Department of State. These instructions forbade the clearance of an American vessel for a Spanish port, but the only

restriction they placed upon the clearance of any other vessel for such a port was that the vessel should not carry cargo of contraband of war or of coal. Thus the clearance of a neutral ship with an American-owned cargo for a Spanish port was permitted, and to this extent trading between enemies was allowed.

Two questions affecting commercial relations as well as belligerent operations, may be mentioned in this place. The first is that of the cutting by a belligerent of submarine cables owned by neutrals, in order to prevent the adversary from making use of them in furtherance of hostile designs. The protection of submarine cables outside territorial waters is regulated by the international convention signed at Paris, March 14, 1884. This convention, to which the United States is a party, expressly provides that its stipulations "shall in no wise affect the liberty of action of belligerents." The precedents as to such action, prior to the war with Spain, were not numerous, since communication by cables is a comparatively recent thing. On the outbreak of the war, the Government of the United States considered "the advantage of declaring telegraph cables neutral," and to that end directed its naval forces in Cuban waters to refrain from interfering with them till further orders.[1] This inhibition evidently was soon revoked. Early in May, 1898, two out of three cables were cut near Cienfuegos, with a view to sever connection with Havana. On May 16, an unsuccessful effort was made to cut the Santiago de Cuba-Jamaica cables; and two days later one of them was severed 1.3 miles off Morro Castle. May 20, the cable connecting Cuba and Hayti was broken outside the marine league off Mole St. Nicholas. July 11, the cable connecting Santa Cruz del Sur, Trinidad, Cienfuegos and Havana, with Manzanillo and the east of Cuba, was cut; as was also, five days later, the line connecting Santa Cruz and Jucaro.[2] All or nearly all the cables were the property of neutrals. The neutral (British) cable from Bolinao, in the

[1] Naval Operations of the War with Spain, 176.

[2] Naval Operations of the War with Spain, 186, 208, 209, 210, 211, 244, 255.

Philippines, to Hong Kong was cut by Admiral Dewey.[1] In all these cases the object of the interruption was to confuse and frustrate the military operations, whether offensive or defensive, of the enemy.[2]

The second question is that of the disposition of mails found on board captured vessels. The instructions issued by the Secretary of the Navy, August 18, 1862, to naval officers of the United States, contained the following paragraph on this subject:

"Fourthly. That, to avoid difficulty and error in relation to papers which strictly belong to the captured vessel, and mails that are carried, or parcels under official seals, you will, in the words of the law, 'preserve all the papers and writings found on board and transmit the whole of the originals unmutilated to the judge of the district to which such prize is ordered to proceed;' but official seals, or locks, or fastenings of foreign authorities, are in no

[1] When Admiral Dewey obtained possession of the Philippines end of the line, he found himself prevented, by the provisions of the Spanish franchise under which the cable was laid, from controlling the Hongkong end so as to make of the line an exclusive use. The United States then sought permission for the landing at Hongkong of a new cable from the Philippines, to be constructed by an American company. The British Government, on consultation with the law officers of the Crown, decided that to grant the permission under the circumstances would constitute a breach of neutrality, and that it therefore could not be done. (Mr. Day, Sec. of State, to Mr. Hay, May 22, May 31, and June 3, 1898, MS. Instr., Gr. Br., XXXII, 511, 524, 528.)

[2] Claims for damages were submitted by or on behalf of the companies whose cables had been cut, namely, the Eastern Extension Telegraph Company, the Cuba Submarine Telegraph Company, and the French Trans-Atlantic Cables Company. The position taken by the United States with reference to these claims was that, as a general proposition and as a matter of law, neutral telegraphic cables were exposed to the same vicissitudes in time of war as other neutral property; that this view found conventional confirmation in Article XV of the treaty of Paris of March 14, 1884, for the protection of submarine cables, which stipulated that the convention should not be understood to affect the liberty of action of belligerents, but that it was preferable to consider the claims from the point of view of equity; wherefore the President submitted them to Congress with a recommendation that, as a matter of equity, they be favorably considered to the extent of the actual damage suffered. (Mr. Hay, Sec. of State, to Mr. Cambon, March 13, 1900, MS. Notes to French Legation, XI, 21.)

case, nor on any pretext, to be broken, or parcels covered by them read by any naval authorities, but all bags or other things covering such parcels, and duly seized and fastened by foreign authorities, will be, in the discretion of the United States officer to whom they may come, delivered to the consul, commanding naval officer, or legation of the foreign government, to be opened, upon the understanding that whatever is contraband or important as evidence concerning the character of a captured vessel will be remitted to the prize court, or to the Secretary of State at Washington, or such sealed bag or parcels may be at once forwarded to this Department, to the end that the proper authorities of the foreign government may receive the same without delay."[1]

No international discussion as to the disposition of mails arose during the war with Spain. By the Universal Postal Convention of Vienna, Art. IV, sec. 1, which was in force at the time, "the right of transit" was guaranteed "throughout the entire territory" of the countries forming the Universal Postal Union, of which both the United States and Spain are members. This stipulation was held "to insure the safe transit under any conditions of closed mails passing from one country of the Postal Union to another country of the Union;" but to have "no bearing on mails passing from one post-office to another post-office in the same country."[2]

By the protocol signed at Washington August 12, 1898, provision was made for the immediate suspension of hostilities, as a preliminary to the conclusion of peace. The blockades were immediately raised, and on August 17, 1898, the Department of State, in response to inquiries made on behalf of the Spanish Government, declared (1) that no obstacle would be interposed to the reestablishment of the postal service by Spanish steamers between Spain on the one side and Cuba, Porto Rico, and the Philippines on the other; (2) that no objection would be made to the importation of supplies in Spanish bottoms to Cuba and

[1] Official Records of the Union and Confederate Navies, Series I, vol. 1, pp. 417, 418.

[2] Mr. Smith, Postmaster-General, to the Sec. of State, June 1, 1898, MSS. Dept. of State.

the Philippines, but that it had been decided to reserve the importation of supplies from the United States to Porto Rico to American vessels; and (3) that a Spanish steamer, chartered by French merchants and then lying at Havre, would be permitted to proceed to Philadelphia and to take mineral oil for industrial purposes, provided it was not to be transported to Porto Rico. These answers, it was added, were given with the understanding that American vessels would not for the time being be excluded from Spanish ports, as well as upon the understanding that, if hostilities should at any time be renewed, American vessels that might happen to be in Spanish ports would be allowed thirty days in which to load and depart with non-contraband cargo, and that any American vessel which, prior to the renewal of hostilities, should have sailed for a Spanish port would be permitted to enter such port and discharge her cargo, and afterwards forthwith to depart without molestation, and, if met at sea by a Spanish ship, to continue her voyage to any port not blockaded.[1] These conditions were accepted by the Spanish Government,[2] and commercial intercourse was accordingly restored.

[1] Mr. Moore, Acting Sec. of State, to M. Cambon, French ambassador, For. Rel. 1898, 802.

[2] M. Cambon to Mr. Moore, September 6, 1898, For. Rel. 1898, 811.